Ontario

Ministry of the
Attorney
General



# Report
# on
# The Expropriations Act

prepared by R. B. Robinson, Q.C.

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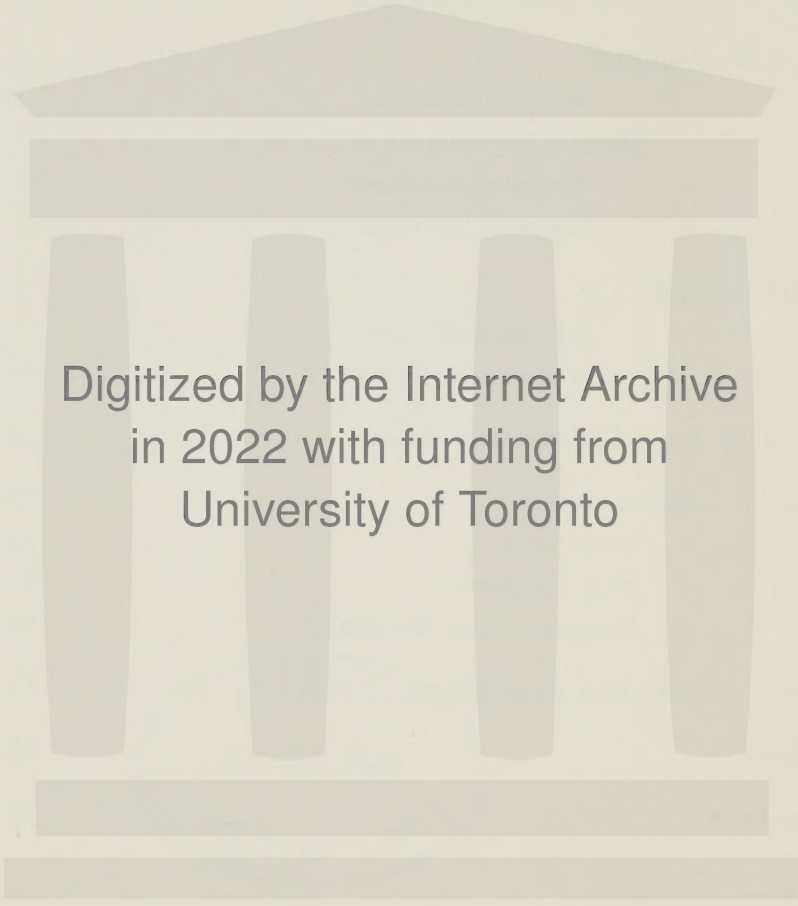

# REPORT
## ON
# THE EXPROPRIATIONS ACT
## OCTOBER 11, 1974

**R. B. Robinson, Q.C.**

### TERMS OF REFERENCE

The study will examine all aspects of expropriation procedures in Ontario today: to ascertain whether or not these procedures and the institutions presently established are providing a proper balance between the general public need for expropriation and the protection of the rights and reasonable expectations of persons affected by these procedures; to investigate whether the present public and private costs of expropriation are warranted; to study alternative approaches to satisfying the public and private needs and reasonable expectations; and to make recommendations to the Attorney General.

Specific matters to be examined will include:

1. An analysis of the public and private costs of present expropriation procedures.

2. The function and role of the Land Compensation Board in the expropriation process, and the practicality or desirability of transferring other related adjudicative functions to the Board.

3. An analysis of the adequacy of present legislation in terms of its comprehensibility and viability.

4. An examination of the present system for providing for hearings of necessity.

5. The basis for the compensation of individuals affected by expropriation.

## THE EXPROPRIATIONS ACT, R.S.O. 1970, c. 154

The Expropriations Act has its roots in private and public discontent, fifteen years ago, with procedures and compensation relating to the expropriation of land in Ontario. At that time there was no statute of general application to all expropriations; on the contrary, 35 Ontario enactments conferred powers of compulsory acquisition, variable as to purpose, procedure, and compensation. The private citizen complained of arbitrary power and unfairness; for the expropriating authority there was uncertainty and inconsistency.

In 1962 the report of the Select Committee on Land Expropriation recommended a uniform statute, and The Expropriation Procedures Act, 1962-63 was the result. It came into force on January 1, 1964. Important principles still required further examination and this was undertaken by the Ontario Law Reform Commission, which issued its report in September, 1967, and also by the Royal Commission — Inquiry into Civil Rights, of the Honourable J. C. McRuer, whose report was issued in February, 1968. From the former, The Expropriations Act draws its provisions as to compensation, and from the latter, its provisions as to procedure.

Notable changes effected by the new statute include (a) the approval procedure, (b) the substitution of market value plus damages in place of the value to the owner principle, and (c) the establishment of the Land Compensation Board.

While the statute is principally concerned with compensation arising from the expropriation of land, its application extends quite explicitly to injurious affection where no land is expropriated, and, less obviously and less successfully, to injurious affection arising from the closing of roads.

## THE PRESENT STUDY

It is not intended that the present study will include a general re-examination of the matters already considered in great detail in the three reports above mentioned. Most of the fundamentals which they covered still operate within the present corrective statute.

By this time, however, The Expropriations Act has experienced six years of operation, and its performance in practice can be analyzed. The purpose of the present inquiry is to consider its practical effectiveness as the major expropriation statute in Ontario.

Submissions and briefs have been received from, and discussions held with private citizens, representatives of expropriating authorities, government officials, appraisers, lawyers practising in the field of compensation, and others.

## CHAPTER I

## GENERAL OBSERVATIONS

Since expropriation involves the power to acquire land without the owner's consent, it will always be met with resentment. On the other hand it is universally regarded as a necessary tool for carrying out beneficial public projects; no arguments were presented to the commissions of the 1960's urging that the power should be abolished. Because it represents an encroachment on private rights, the Courts naturally insist upon full and strict compliance with conditions precedent, procedural steps and time limits; expropriating authorities must therefore weave their way with great care through a highly intricate process. As a result, an expropriation is undertaken in a highly-charged atmosphere, with the land owner likely to be antagonistic and the public authority under pressure.

The basic complaint of the owner must always be that his land is expropriated at all. This is a complaint initially levelled at the political decision involved, the decision to undertake a specific project for which private land is needed. Strictly speaking The Expropriations Act has little to do with this political decision, but any dissatisfaction which the owner feels is directed to the statutory process into which he is drawn.

It has been widely urged that, to make the political decision more acceptable, and therefore the expropriation process as well, an open and communicative manner of planning should be undertaken by expropriating authorities, involving the maximum feasible involvement of private owners affected. In recent years there has been a thrust in this direction, particularly in site and route selection, and one of the recommendations of this study is a continuation of such a policy.

The most striking innovation of the McRuer Report was the recommendation of an inquiry and approval procedure prior to expropriation. Adopted in The Expropriations Act it has had a mixed reception. The private owners, for whose sole benefit it was enacted, find difficulty in accepting the fact that the political decision is not a relevant issue before the inquiry officer and the further limitation that the report of the inquiry officer has only persuasive but not binding effect. Theoretically sound these limitations may be, but they do nothing to lessen antagonism to the process. Further, there is a question as to the effectiveness of the inquiry procedure in the case of a massive expropriation.

The public authority, anxious to proceed with construction, sees the inquiry process as a frustration and a cause of wasteful expense. The procedure is time-consuming, and delay in an inflationary period is expensive. The statute was written prior to present-day inflation.

Further delay may arise upon an owner's refusal to give up possession even after the proper procedures have been scupulously undertaken and compensation accepted by the owner.

Because of the costs of delay, and the inevitable time span of the expropriation process in any event, several expropriating authorities have concluded that the cheaper policy is to buy the required land at any price and avoid using the statute. This policy has its own cost.

One point must be made strongly to those authorities who complain of delay. They are involved in public projects which require private land, and the acquisition of such land cannot be accomplished overnight. It has been necessary to enact legislation to provide a fair procedure for expropriation, and the process of justice is a slow one. The delay may be costly and frustrating for the authority, but for the owner, the dispossession and disruption are even more upsetting. Expropriating authorities must continue to expand their time-flow charts and allow generously for a due process of land acquisition.

To pursue the question of expense, there is virtually unanimous agreement that section 33 of the Act, which provides for payment to the expropriated owner of his costs of the proceedings, is simply too generous. Examples of the practical operation of this section will be provided later in this report. They are guaranteed to astonish, for the section breeds costs. It should be amended, but in a manner assuring fair reimbursement to the expropriated owner.

The Land Compensation Board was formed under The Expropriations Act to replace the various arbitration authorities with a single tribunal which would possess the potential for uniform decision-making. This is a high aim not to be lost sight of: it has generally speaking been achieved. The Board was created as a purely judicial tribunal to determine compensation under the Act: it was to be without other duties which might even appear to be in conflict with its basic judicial function. This principle should be retained if further functions should be assigned to the Board.

The Board of Negotiation was set up as an informal negotiating agency under The Expropriation Procedures Act, and was continued without change under the present statute. It has operated unobtrusively and effectively for a decade and should continue in its present role.

The change from the value to the owner concept of compensation to the principle of market value plus damages, has been achieved without noticeable strain. The new procedural provisions have proved to be basically sound and fair. It may be said that the statute is more admired now than when it was first written and it has been widely copied throughout Canada. It is workable legislation, but it needs housecleaning.

## CHAPTER II

## INQUIRIES

### INQUIRY PROCEDURE

Sections 6, 7 and 8 of The Expropriations Act provide for an inquiry procedure to determine whether the taking of an owner's land is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority." The inquiry is held at the request of the owner, and requests are frequent. The report of the inquiry officer must be considered by the approving authority, who is entitled to consider other material as well. The authority then makes the final political decision whether the expropriation should proceed; clearly this decision is not the prerogative or duty of the inquiry officer since he is not the responsible elected official.

The establishment of this procedure is based on the principle that fundamental justice requires the landowner to be given a right to a hearing when the expropriation of his land is at issue.

Six years' experience has left some doubt as to those issues which can properly be brought before an inquiry. The hearing officers are given a free hand in interpreting their jurisdiction; they have not met together in any organized manner and no central registry of their reports is maintained. A single case involving an inquiry has proceeded through the Courts to the Supreme Court of Canada.

One thing is certain. The expropriating authority's objective, (expressed in the political decision to undertake a public project which requires private land) is not a proper issue to be introduced at the inquiry. As the McRuer Report expressed it (p.1007):

> "The merits of the expropriating authority's general policy should not be considered relevant. For example, any evidence as to whether the public work contemplated, e.g., a new road or school, was necessary from a policy point of view, is assumed and treated as being beyond comment."

The main issue at an inquiry hearing is the propriety of expropriating a *particular* piece of land for the purposes of the project. This is a narrow issue, although of fundamental importance to the owner; it will include requests to modify the expropriation plan, or to take a lesser area, estate or interest. A broader aspect of this issue is the question whether the particular piece of land is needed at all for the project. The area of land which the project requires, is therefore a proper issue. A related issue is much more extensive: the feasibility of expropriating an alternative site or route. The McRuer Report expresses the opinion that the study of alternatives should be a valid consideration for an inquiry but the judgment of Stark J. in *Walters* v. *Essex County Board of Education,* [1971] 3 O.R. 346, at 347, where section 7(5) was under consideration, seems to indicate the reverse, and the matter remains unsettled. The practice of most inquiry

officers is to hear evidence of alternative locations. It is to be noted at this point that the issue of alternatives is likely to arise from a group objection, whereas the major issue as to the taking of a particular parcel is an individual objection. The statutory procedure does not invite group objections, but if they develop independently, hearing officers may add parties to the individual inquiry. To facilitate group objections, expropriating authorities should send notices to all affected persons at one time rather than successively.

There have been six years of experience as to the issues which are in fact being raised at inquiry hearings. In spite of the clear intention that the authority's objectives are not relevant, they are challenged in almost every hearing, and much time is wasted in minutely defining what the objectives are in the individual case. The question of alternative routes and sites is raised frequently. Strangely, the 'main issue' as to the necessity of taking all or part of the particular parcel for purposes of the project is seldom raised; yet paradoxically, this was the principal reason for adopting the inquiry procedure. Fairly frequently the question of compensation is sought to be raised; it is clearly irrelevant at the inquiry stage since no expropriation has taken place.

What, then, is being accomplished by the inquiry hearings, for good or bad? The hearings have revealed a great variation in the quality of planning by expropriating authorities. At least one major public work has been undertaken with no advance planning of the project. At the other end of the scale are those authorities, whose engineers, always mindful of the prospect of cross examination at an inquiry hearing, undertake meticulous and expert planning. Several inquiry officers are of the opinion that for certain projects, there was no sophisticated planning until the hearing was requested. What was foreseen by McRuer is in fact taking place. The existence of the inquiry procedure promotes the planning of projects at an earlier time and with greater care. The result is a higher standard with significant savings both economically and socially.

The inquiry procedure is valuable for the individual landowner apart from what may be accomplished by the merits of his arguments. It provides him with an opportunity to be heard and to release his feelings against the expropriation; the importance of this is not to be disparaged. If he has previously been frustrated in his attempts to gain full information about the project, at last it is supplied.

Many expropriating authorities, as a result of 6 years' experience with inquiry proceedings, have come to regard them as a nuisance and a cause of unnecessary expense. Such authorities are often very construction oriented; once a project, after months or years of work, has been designed to a point where the necessary land is precisely delineated, they wish to commence construction immediately. Ontario Hydro has developed an expropriation time-flow chart which shows 16 months required to obtain possession of land by expropriation where there is an inquiry and 10 months if there is no inquiry. Furthermore, the inquiry is only one of the delays encountered in the acquisition procedure. These time periods can be extended a further two months if a Court application is necessary to obtain

vacant possession. Project postponements are immensely expensive in a period of inflation and contribute to the rejection of expropriation as a method of land acquisition in favour of purchase at any price.

A further consideration is that a landowner has a powerful weapon in his ability to delay a project by many months. This weapon is skilfully used by many claimants or their lawyers. Often an inquiry is requested, not for valid reason, but solely for the purpose of delay. Occasionally the threat of a vexatious inquiry is made openly in order to bring about a settlement on extravagant terms. On other occasions it is used as an examination for discovery for a later compensation claim, or in a search for grounds to attack the validity of the subsequent expropriation. Some owners request an inquiry solely through antagonism to the expropriation. All such procedures lead to increased costs on many levels, including the cost to the general public who are delayed in receiving the advantage of the project, which may be urgently needed.

This is a serious situation, and arguments exist for and against the continuation of the inquiry procedure. To some extent it can be considered as the rights of individuals against the needs of the public, or the concerns of people against the machinery of project development.

It is obvious that for all projects, careful planning should be undertaken at the earliest possible stage. The element of secrecy, once closely guarded to reduce land speculation, should be eliminated as much as possible; the more readily information can be given to the owners, the less likely they will be to call for inquiries. When public involvement can be introduced into the planning process, more voluntary sales can be expected and fewer expropriations. These considerations will be amplified later in the report.

## RECOMMENDATIONS

Specific recommendations are made in the following numbered paragraphs.

*(1) On balance it is recommended that the inquiry-approval procedure should be retained.*

*(2) The troublesome and imprecise phrase 'objectives of the expropriating authority' should be removed from section 7(5). The subsection should conclude 'fair, sound and reasonably necessary for the purposes of the public work or project to be undertaken by the expropriating authority.'*

*(3) There should be a clearer indication of the issues which may be brought before an inquiry officer. Form 2 of The Expropriations Act which notifies the owner of the inquiry procedure should state that*

*(a) alternative sites or routes can be considered,*

*(b) amendments to the expropriation plan can be considered, including the area of land to be taken, or the interest to be taken,*

*(c) compensation for land expropriated is not to be considered,*

*(d) an owner need not request an inquiry to preserve his rights to compensation,*

*(e) the necessity for the project or work is not to be considered,*

*(f) group objections may be entertained.*

*(4) An owner who requests an inquiry should be required to supply a brief statement in writing of the nature and grounds of his objection. Section 7(4) requires the expropriating authority to give notification of its grounds and supply relevant material.*

*(5) The persons interested in receiving the Notice of Application for Approval to Expropriate Land (form 2) are the registered owners as defined in section 1 and tenants under lease, with the exception that it should not be necessary to serve a mortgagee or other person whose interest in the land is by way of charge, lien or encumbrance, nor a weekly or monthly tenant, nor an execution creditor.*

*(6) Where a request for an inquiry is withdrawn, the approving authority should be able to proceed as if no request had been made.*

*(7) Form 2 provides that an owner shall have thirty days in which to request an inquiry, following which a hearing officer is assigned 'forthwith.' In a situation where the authority knows that objections will be made, it should be permitted to adopt an alternative procedure designed to bridge the time gap. This procedure should provide that a date for a hearing be obtained from an inquiry officer prior to the notice being given, and that the notice will include the time, date and place of the hearing. At least 30 days' advance notice should be given.* This procedure has been successfully used for 30 years on applications to the Ontario Municipal Board to approve road closings under section 34 of The Public Transportation and Highway Improvement Act.

*(8) The Municipal Board procedure just referred to requires notice to be given by registered mail and by publication, as in section 6(1) of The Expropriations Act. Responses to the publication are so rare as to be non-existent. It is therefore recommended that single newspaper publication be regarded as sufficient under section 6(1), rather than three. The effective notice is the service by registered mail.*

*(9) In order to reduce the time occupied by an inquiry, several provinces have imposed strict time limits. The Expropriation Act of Alberta, for example, requires the Attorney General to appoint an inquiry officer within 5 days, and requires the officer to make his report within 30 days of his appointment. Time limits also appear in the federal Expropriation Act. It is recommended that similar time limits be included in the Ontario statute.*

(10) Section 7(6) requires that the inquiry officer shall report to the approving authority a summary of the evidence and argument, the findings of fact and his opinion on the application for approval. This report must be considered by the approving authority and forms part of the material on which he bases his decision to approve or disapprove the expropriation. The decision in *Walters* v. *Essex County Board of Education* 5 L.C.R. 144 (S.C.C.) gives ample sanction for the authority to consider additional material.

The inquiry officer's report is not, however, required to be submitted to the owner at any stage in the proceedings. This is unobjectionable in strict theory because the owner does not have access to the additional material either, and the requirement of a partial disclosure of the basis of the authority's decision is not reasonable. Swift J. in *Denby & Sons, Ltd.* v. *Minister of Health,* [1935] 1 K.B. 337, described such disclosure of prior material as inconsistent with efficiency, practice and responsibility. Nevertheless, the interest of an owner in knowing the contents of the report of an officer before whom he made his case, rises above mere curiosity. If it were delivered to him along with the reasons which the approving authority must send under section 8(2), it could be put in proper context by those very reasons, and the objections to its delivery would be reduced. The federal, New Brunswick and Alberta statutes require the report to be submitted to the owner. It is not, however, required in the corresponding English practice.

*It is recommended that a copy of the inquiry officer's report should be sent to the owner with the approving authority's decision.*

*(11) The limitation of costs of $200.00 in section 7(10) is now too low, particularly where a consultant is needed to advise on alternative sites and routes. The recommendation as to quantum of costs should be in the discretion of the inquiry officer.*

*(12) Inquiry officers have been providing service of high quality often under adverse circumstances. At present they cannot afford secretarial or reporting service even in a major inquiry. They are not being paid enough and their fee structure should be revised.*

## MASSIVE EXPROPRIATIONS

The problems arising from expropriations for massive projects such as new townsites, arise from three main causes.

1. The procedures contained in The Expropriations Act are intricate and complex; the Courts heavily penalize any procedural error because the expropriation process invades private rights. A massive and smooth-running organization must be set up and maintained in operation for several months or even years. It includes a staff of land agents operating in the field in continual contact with the private owners who are losing their land. The agents feel the owners are antagonistic and unco-operative while the owners feel the agents are inept and insensitive; a problem of public relations arises.

2. The Expropriations Act focuses on the acquisition of a single parcel of land: few sections were designed for a multiple acquisition. While compensation is nearly always an individual matter, acquisition procedures usually have a multiple effect.

3. A massive public project raises community and environmental concerns and the present inquiry procedure is not geared to examine them.

This report cannot deal with the organizational problem. The necessary experience exists within the Ministry of Government Services, the Ministry of Transportation and Communications, Ontario Hydro and the North Pickering Project of the Ministry of Housing; this experience has shown that with sufficient advance planning, the procedures in The Expropriations Act will work successfully. As to the problem of public relations, a submission received from an owner in North Pickering expresses the viewpoint of 'the victim', in making these comments:

(i) don't expropriate if this traumatic step can possibly be avoided;

(ii) have a detailed plan of the scheme;

(iii) avoid retroactive legislation;

(iv) move quickly from one procedural step to the next; don't leave the people hanging in the air;

(v) make settlements public, since the owner will find out anyway. (It is the experience of the writer of this report that what the owner 'finds out' is usually wrong.)

(vi) make sure settlements are uniform;

(vii) be humane; employ civil servants who understand that money will not fully compensate for forced loss, and that many people will be very upset;

(viii) interpret the statute generously, not restrictively;

(ix) send out simply-worded notices, with a letter of explanation if necessary;

(x) help the victims relocate;

(xi) be available for consultation;

(xii) do not belittle public concern;

(xiii) welcome the owner's participation in planning.

These are valid points worthy of consideration.

The distinction between the individual and group aspects of expropriation planning under the Act is most troublesome in relation to the inquiry procedure. The inquiry officer, in considering the necessity to expropriate a particular piece of land is dealing with an individual concern. With his consideration of route or site selection, as recommended in this report, the interest of a group is introduced. It is, however, at a much earlier stage that the group would like to become involved; i.e., at the time of the initial decision to undertake a massive, or major, or even significant project. Not surprisingly The Expropriations Act contains no provision for group involvement in the early stages of planning, nor indeed for *any* involvement in policy decisions; the principle contained in the McRuer Report is that the decision to expropriate and what should be expropriated are independent political decisions, made by an authority in a position to accept clear political responsibility — ultimately at the polls. It is significant, however, as stated before, that there is an attempt to invade this field in

virtually all inquiries under section 7(5) through a challenge as to what are the "objectives of the expropriating authority."

The pressures for public involvement in political decisions were not the same in 1968 as they are in 1974 and the changing attitudes will no doubt have to be reflected in the planning of massive projects requiring the exercise of the expropriating power.

The desire for group participation in the planning process, now very strong, relates to community and environmental concerns, such adjectives being broadly interpreted to include social, economic and cultural conditions. A hydro line affects the rural environment; the freeway splits a community; the new town destroys the old hamlet. In response to the new pressures, the Ministry of the Environment, in September, 1973, published its Green Paper on Environmental Assessment. The first sentence of the Paper reads:

> "In recent years, massive new projects such as nuclear power plants, freeways, new towns and international airports have drawn the attention of the public to the need for increased consideration of environmental matters."

Environment in the Green Paper is the human as well as the natural environment. The following comments are made in the Paper:

> "present legislation has not provided the means of ensuring that all environmental factors are considered in a comprehensive and co-ordinated fashion, including public input, before major projects and technological developments proceed. It is the intention of the Government to encourage the further development within its planning process, of an environmental conscience.
>
> "A procedure should be developed to bring about an integrated consideration at an early stage of the entire complex of environmental effects which might be generated by a project. Successful implementation of such a procedure is dependent upon the exercise of powers within provincial jurisdiction. Without a strong provincial involvement in this area, society could often be in a situation of reacting to environmental problems which could have been avoided.
>
> "The essence of such a strengthened approach to prevention is not only that it would be far more effective than an unco-ordinated set of approvals procedures but that it would minimize the future need for abatement and restoration. Experience in existing programs has clearly demonstrated that it is more economic to incorporate environmental objectives at the conceptual stage of a project than to provide abatement equipment and restorative efforts as an afterthought.
> "With these factors in mind, the Government has indicated its intention to establish a comprehensive system of assessment and evaluation of the environmental significance of activities within both the public and private sectors.
>
> "There are three key elements to the proposal to expand and strengthen the preventive aspect of the Province's environmental

programs. These are embodied in the following three phrases: first, 'integrated consideration;' second, 'at an early stage,' and third, 'of the entire complex of environmental effects which might be generated by a project.'

"Another factor implied in the element of 'integrated consideration' is the need for a commitment to public participation. The perceptions, attitudes and values of members of the public can play an important role in the identification of potential impacts, the assessment of their significance, and the evaluation of the overall advantages and disadvantages, including trade-offs, involved in proceeding with an undertaking.

"A second key element in the statement is that the consideration should take place 'at an early stage.' This is important for a number of reasons. First, it ensures that environmental factors are considered at a time when alternative courses of action, including any measures to mitigate adverse effects, and the alternative of not proceeding, are still available and before actual environmental damage occurs. Second, early assessment would enable positive public contributions at the conceptual planning stage. Last, as indicated above, it is more economical to incorporate environmental safeguards at the conceptual stage."

The manner in which these principles will be carried into legislation is unknown at the time of writing this report, but legislation is expected. It is hoped that the planning of public projects for which land must be expropriated will be influenced by these principles, and may include public involvement and information, early consideration of environmental concerns, measures to reduce adverse effects, and the possibility of not proceeding at all.

If such matters can be considered fully and early, much of the sting of later expropriation can be removed.

Site and route selection should also be treated in the same manner; i.e. early and with public involvement. An argument can be strongly made that it is much too late to raise the question of the location of the project at the expropriation inquiry. By this time the detailed design has been completed at great expense in time, money and effort. The expropriation proceedings cannot begin until such design is finished, because the precise area to be expropriated can only then be finally known.

All matters such as these should be determined prior to giving notice of the intention to expropriate. They are the matters of general public concern, the matters involving the group rather than the individual. Ideally, what should be left for the expropriation inquiry is only those matters which relate to the individual's particular piece of land, such as its exclusion or reduction in relation to the overall scheme.

There have already been a considerable number of projects planned under a policy of public involvement and information. Examples are a provincial park acquired by the Ministry of Government Services, highway developments undertaken by the Ministry of Transportation and Communications, route selection for Ontario Hydro by the Solandt Commission

under The Public Inquiries Act, site selection for the Central York-Pickering sewage project under The Environmental Protection Act, developments during the last two years which have led to Ontario Hydro's principles of acquisition, and urban renewal projects in Toronto.

These are indications of a thrust which will surely continue.

Positive evidence has been brought to this study that where early public involvement and information have been present, land purchases without expropriation have increased in number, and fewer hearings of necessity have been required. As a specific example, certain landowners expropriated for the Central York-Pickering sewage project have shown no desire to request an expropriation inquiry, because of the opportunity they had to participate in the site selection hearings.

It seems apparent that since the inquiry procedure under section 7 is the only statutory opportunity provided to the public to make its views known, much unintended pressure has been focused upon it. For this reason inquiry hearings have become much longer and more complex than was expected in 1968.

It is not suggested that early public involvement is a panacea. Sometimes it will smooth the way to an easier development of the project; on other occasions there will be continual opposition and turmoil. In the final result the political decision will still have to be made by the responsible official; perhaps it will be better informed through public input.

There are two general approaches to the massive project.

1. If the authority chooses to operate without early public participation in the environmental concerns plus site and route selection, it may have to allow several months while the inquiry hearing is confronted with these issues. No reduction can be expected in misconceived or vexatious inquiries. Flow charts will have to be flexible for delay. If this prospect is too formidable, the authority may choose to apply for an order in council dispensing with the inquiry procedure. Such orders have rarely been made to date.

2. Alternatively a process of public involvement can be undertaken. It should be flexible and variable, with every effort made to gain public support. The process should take place well before the design stage of the project. The function of the inquiry under The Expropriations Act should be reduced and confined to individual objections. Although the expected environmental legislation is not known at this time, the Green Paper stresses integration; since some of the issues in the environmental assessment overlap with those in an expropriation inquiry, duplication is to be avoided.

**RECOMMENDATIONS**

*It is recommended that environmental legislation which may be passed pursuant to the Green Paper on Environmental*

*Assessment, contain procedures which will allow consideration of the following matters relevant to expropriation:*

(*a*) *the necessity for the project,*

(*b*) *the area to be covered by the project, and*

(*c*) *alternative sites or routes.*

In the planning of a massive project, the timing of the act of expropriation presents very great problems. With public knowledge of a proposed development, a powerful market force is created. Sometimes speculators will start to assemble land in the area involved, whereby prices escalate; sometimes, on the other hand, the free market in land is eliminated and owners wishing to sell complain that they cannot find a purchaser. It is for these reasons that secretive, unannounced expropriations seemed justified some years ago.

In order to control these market tendencies, public authorities may be compelled to undertake the necessary expropriations as early as possible in the planning process. There are other advantages. The expropriation fixes the date of evaluation, and uniform prices can be paid. For those owners choosing to sell immediately, there is legal authority to pay the benefits under The Expropriations Act, such as the residential allowance and relocation costs. Since the expropriating authority will have gained title to the land, the offer and tender of payment under section 25 can safely be made. An owner who has received the tender of 100% of the authority's valuation can invest it and protect himself against increases in real estate values while deliberations continue. If agreement cannot be reached, the statutory negotiation and arbitration procedures are available. If land is acquired by expropriation, the abandonment procedure is available should the project be discontinued; it is not available if the land is sold by the owner to the authority.

These are powerful reasons for an expropration at an early stage of planning; they prevailed in the case of the North Pickering Project.

There are also two serious countervailing considerations. In the first place, an early expropriation will be based merely on a concept, rather than a fully developed scheme. Second, while planning is in the conceptual stage, it is difficult to know precisely what lands are to be expropriated. Both of these difficulties negate a meaningful inquiry hearing; without details of the project, including exact knowledge of its size and boundaries, it is impossible to determine whether the taking of a particular parcel of land is necessary for the objectives of the authority. Put simply, the very objectives have not been developed.

It was the dilemma produced by these difficulties that led to an order dispensing with the inquiry procedure for the North Pickering project.

A further matter of concern to the government arises from the fact that an authority's project normally involves continued public ownership of the land expropriated. This is not the situation in projects of urban renewal or the development of new towns, where most of the land returns to private

ownership. The abandonment and sale provisions of the Act will have to be clarified in relation to such projects.

Consideration has been given to a possible new procedure for massive expropriations which would employ a designation plan of the area, (similar to the designation of land for a King's Highway under The Public Transportation and Highway Improvement Act). Such a procedure would involve the following steps, briefly described.

(i) A conceptual plan for the project is adopted.

(ii) A designation plan for the land included in the concept is registered in the Land Registry Office. The plan freezes the land in its existing uses and prohibits building.

(iii) A hearing of inquiry into the project is held whether under environmental legislation or otherwise, dealing inter alia with the necessity for the project, its size and location, and alternative sites (or routes).

(iv) If the decision is made to proceed, a certificate of approval of the expropriation is given without an inquiry under The Expropriations Act at this stage, and the necessary land is expropriated. Compensation is unaffected by knowledge of the project, through the application of section 14(4)(b).

(v) The design of the project is completed and prior to giving notice of possession the statutory inquiry is held, limited to matters affecting the individual parcel. Any necessary abandonments are made under section 42.

The advantage of this procedure is that the public inquiry precedes the expropriation, while at the same time land speculation would be discouraged by the designation plan. However, the public hearing might be extremely lengthy and the freezing of the land for a prolonged period, without expropriation, would inevitably be unsettling for the private owners; for this reason, the procedure above outlined is not recommended.

The conclusion reached by this study is threefold:

1. expropriation should be allowed at an early stage in the planning process because of the very great advantages outlined on page 12;

2. the authority undertaking the development should be permitted to approve and complete the expropriation of the necessary land on the basis of a planning concept instead of a completed design; but

3. this procedure should only be allowed where a public inquiry into the project is instituted at the same time.

## RECOMMENDATIONS

*It is therefore recommended that an alternative expropriation procedure be made available for authorities under-*

*taking large public projects requiring extensive and lengthy planning.*

1. *A conceptual plan for the project will initially be adopted.*

2. *A public hearing of inquiry into the project will be held, whether under environmental legislation or otherwise, which may deal inter alia, with the necessity for the project, its size and location, and alternative sites (or routes).*

3. *At any time after the adoption of the conceptual plan, a certificate of approval of the expropriation of land within the boundaries of the conceptual plan may be given without the inquiry procedure under section 7 and therefore without the necessity of an order under section 6(3) dispensing with the inquiry procedure. Expropriation will take place by the registration of a plan or notice under section 9. Compensation will be unaffected by the project, through the application of section 14(4)(b).*

4. *Expropriated owners will receive the notices, offers and appraisal report provided for in the Act. No notice of possession, however, will be served until the owners are given the opportunity of requesting an inquiry under section 7 which will be limited to a consideration of the necessity of particular parcels for the purposes of the project. Notice offering such an inquiry will be based on the fully-developed scheme.*

5. *The abandonment and disposal provisions of the statute will apply to lands not needed for use under the completed scheme.*

This procedure would provide a planning concept as the basis for public hearings and for early expropriation, but possession of the land could not be taken until the concept had matured into a fully-developed scheme and the owners had been offered an inquiry similar to that under section 7(b). It is expected that the latter inquiry would rarely be needed, or at least would be shortened, because of the opportunity for public participation in the earlier hearings.

## CHAPTER III

## COSTS

Prior to the present statute, an expropriated owner was entitled to receive his costs of the proceedings, taxed as between party and party, on a generous basis. For the costs of his appraisers, he received payment based upon their preparation and reports up to the hearing, but only the normal, meagre witness fee for their attendance before the arbitrator.

In the swing towards a principle of total reimbursement in the 1960's, a new provision was written into The Expropriations Act as section 33; it reads:

"1. Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause (d) of section 45.

"2. Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with the order and the tariffs and rules prescribed under clause (d) of section 45 in like manner to the taxation of costs awarded on a party and party basis."

The only 'tariff and rule' passed is the following:

Ontario Regulation 491/71.

"1. The amount of legal, appraisal and other costs shall be in the discretion of the taxing officer to be determined quantum meruit and in so doing the taxing officer may reduce the amount of, or disallow, any item of cost upon the ground that the same was not reasonable in amount or was not reasonably incurred.

"2. Subject to subsection 1, legal costs shall be taxed, quantum meruit, by the taxing officer as on a taxation of costs as between solicitor and own client."

These provisions have been a golden goose, laying eggs, but eggs of gold. Splendidly generous to landowners, they have caused more complaint from expropriating authorities as guardians of the public purse than any other provision of the Act. They have contributed to the unhealthy philosophy 'buy at any price rather than expropriate', because with the costs of expropriation, the price was likely to be higher still.

It is to be noted that the costs are tied to 'the amount offered by the statutory authority'. This is interpreted, no doubt correctly, as a reference to the offer made under section 25 within three months of the expropriation. Later offers, no matter how generous, do not count. The offer under section 25 is usually made when the authority has scant information about the owner's claim, and is probably under great pressure of time, especially in a multiple expropriation. To the extent that the offer must include future damages and relocation costs, they can only be guessed at. No criticism can be levelled at a tendency to estimate them modestly.

To obtain full costs, the owner need only achieve an ultimate award of 85 per cent of the initial offer. By the nature of the process this must always happen, and subsection (2) of 33 is withering from disuse.

There are four significant omissions, all oversights. First, there is silence as to costs where there is no determination by the Board, i.e. on a settlement. As a matter of fairness, the universal practice is for costs to be paid on a settlement in spite of the oversight. Second, there is silence as to the dilemma where no offer has been made at all; this may happen where, for example, an injurious affection claim does not arise until after the offer period, or in a case where the authority believes a tenant has no rental advantage, or where an offer is adjudged deficient. Third, there is no appeal from the taxation of costs by a taxing officer; and fourth, there is no provision for the Board to award the costs of motions.

"Reasonable legal, appraisal and other costs" is a phrase capable of generous interpretation. It may allow, for example, the costs of consultants called in to study whether land has a valuable potential, but who have submitted a negative report. It may allow the cost of an appraisal report felt to be too low and therefore rejected by the owner.

This study has heard no complaint from any private owner about section 33. Every reference to costs has submitted or acknowledged that they are at present too generous.

How serious is the problem? A few examples will indicate what can happen; the examples are all extreme cases.

The first taxation to startle the province followed a 12-day hearing before the Land Compensation Board where compensation was awarded in the amount of $114,250.00, the formal offer having been $88,350.00. Total costs of the owner were taxed at $33,500.00. The decision of the Taxing Officer ends with these words,

> "I cannot conclude these reasons without pointing out that these costs, which are, at most, the claimants' total costs of the expropriation proceedings, exceed the amount by which the Board's award exceeds the expropriating authority's prehearing offer and indeed they are almost

> exactly 30 per cent of the total value of the expropriated lands. The total costs of these expropriation proceedings to the expropriating authority will doubtless be at least half the value of the lands expropriated. Sometimes, it seems the cost of an orderly society is substantial, indeed."

The largest claim yet made to the Land Compensation Board was for $10,000,000.00; the Board's award after almost a month's trial was $59,809.05. The claimant's costs were later taxed at $84,103.30, considerably higher than the award itself. In another case, after an offer of $500,000.00, the case proceeded to trial, where compensation was awarded at $510,000.00 (ultimately increased to $530,000.00 upon a settlement of the appeal). The claimant's bill of costs was presented in the amount of $67,648.50 and taxed at $30,472.52. In an injurious affection case a claim was made for $49,651.35 and the award, after a lengthy trial, was $30,415.95. The claimant presented a bill of costs for $51,750.51, which was taxed down to $17,000.00. In a more normal case where the award was $494,200.00 after a 4½-day hearing, the claimant's bill of costs of $41,325.29 was reduced on taxation to $21,085.29.

It should be pointed out in fairness that these bills include substantial disbursements and are made up of the accounts of the lawyers, appraisers, planners and other consultants involved. It is also to be remembered, however, that the expropriating authorities also had to pay their own costs of the proceedings.

One cause of heavy costs is the length of hearings before the arbitrators. In the 1950's a 3-day trial was regarded as long; it is now short. The reason is the increased complexity of expropriation cases. With urban renewal schemes, it is fairly common for established businesses to be disrupted and forced to move. When this happens the claims for various aspects of business disturbance are numerous and full of detail; they include losses on forced sale of inventory, cost of relocating fixtures, moving costs, loss of profits during relocation, loss of executive time, training new staff, increased expenses at the new location and diminution of goodwill. If these issues cannot be settled, they are time-consuming at the hearing.

An equally important reason is the increased number of cases requiring the valuation of the future potential of a property. As the tempo of development in Ontario has increased, so has the number of these cases. A vacant parcel may have a potential for an industrial subdivision. A residentially-zoned property may have a potential for a commercial rezoning. A site containing a house may have a potential for an office building. Such cases lead to lengthy evidence from appraisers, planners and even engineers, and cannot be disposed of quickly.

The present provision for costs seems to presuppose a claimant's right to carry his case through to a full hearing without cost to himself. This has had two effects: it has dulled the owner's incentive to settle, and has fostered a tendency toward overpreparation. It is simply too generous.

It is useful to consider the English practice as to costs. In the first place legal costs are party and party costs, as against solicitor and own

client costs in Ontario; a claimant in England, therefore, is expected to bear some share of his own legal costs. Appraisal costs follow a tariff of The Royal Institution of Chartered Surveyors. Under the English practice the expropriating authority may make increased offers up to the hearing, and the final offer governs the costs. In Ontario, as already explained, the initial offer governs, in spite of later increases. If the English claimant fails at a hearing to gain more compensation than was offered, he must pay not only his own but the expropriator's costs after the date of the offer. No claimant under the Ontario statute, however unreasonable his case, has ever had to pay the expropriator's costs.

In summary, normal litigation practice upon a payment into court governs expropriation costs in England. It is felt proper to retain a more generous standard in Ontario, which will be reflected in the recommendations which follow.

## RECOMMENDATIONS

1. *It is not recommended that costs should be based on the party and party scale. It is concluded that the standard of costs should continue to be "the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable".*

2. *The entitlement to costs should not depend on the fact of an offer being made nor a hearing held before the Land Compensation Board. The entitlement to costs should commence when the actual expropriation takes place, and the entitlement should continue until an offer by the authority is accepted by the owner, or until settlement is reached in any other manner, or until compensation is determined under the Act. For example, if an owner retains a consultant to advise whether he should accept the authority's offer, and on that advice he does accept it, the owner should receive costs to pay the consultant's fee.*

3. *The expropriating authority should have the right to make an unconditional offer of compensation in writing up to and including the day before the hearing commences and such offer should govern costs. If the offer is not accepted and the compensation is determined or settled at a lower amount, then the claimant should be entitled to costs only up to the receipt of the final offer. The provision relating to 85 per cent of the offer should be deleted.*

It is simple fairness to permit the expropriating authority to make later offers upon which the costs will depend. The authority becomes better and better informed about the owner's claim as it proceeds through the expropriation process, by attending at a hearing of the Board of Negotiation, by receiving the owner's written statement of claim, upon conducting discoveries, examining the relevant documents, and finally receiving the

reports of the owner's experts. As this process of information develops, the authority is better able to make a more informed offer.

The advantage of permitting later offers (allowed, incidentally in the federal statute) is that, by making a truly generous offer, the authority can reduce the risks of the burdensome costs of the hearing. Correspondingly the claimant who refuses a generous offer can no longer expect to be paid his costs of the hearing.

> 4. *Except as indicated in the preceding recommendations, the costs of and incidental to any proceedings before the Board should be in its discretion. This would permit the Board, depending on the facts of the individual case, to award costs to the authority where the compensation was determined at a lower figure than the offer. It would also allow the Board to award costs upon motions before it.*

PREPARATION

The experience of costs under the existing statute is that the costs of preparation are as startling as the costs of the hearing. There are two reasons for this, to some extent interrelated. Appraisers' fees have risen dramatically over the last six years, and overpreparation of cases has become common.

The increase in appraisers' fees since the new statute came into force, has drawn considerable comment. Appraisal reports costing $2,000.00 to $5,000.00 and reflecting research of 10 to 20 days are not uncommon. Increases are certainly justified to the extent that cases have become more complex. The valuation of the future potential of a property, for example, requires time-consuming research. Some appraisers have even commenced the use of computer analysis, and this practice is expensive. In spite of the increased complexity the Land Compensation Board has consistently favoured simple appraisal methods and is now openly discussing a penalty in costs where time-consuming approaches to valuation have proved of little usefulness or relevance. This should produce a useful first step in solving the problem indicated in the following quotation from a decision of the Taxing Officer at Toronto.

> "For myself, I say it is high time someone in authority and familiar with the work involved in evaluating real property, if such a person exists, considered very carefully the formulation of some effective method of controlling, if not the fees charged by appraisers, at least the proportion thereof that the expropriating authorities must pay. The present system is nothing but the visible results of an abdication of authority behind the scenes by someone. I agree with the claimant that it is manifestly unfair for me to deny to the claimant full recovery of his disbursements for appraisers' charges where they have been fairly and reasonably incurred for necessary services. However, the respondent is spending tax money, that is, trust money, and I, for one, do not think that money should be thrown about too liberally. As a taxing officer I am compelled to determine these reasonable costs and

I have already discussed the matter of reasonableness. Until some kind of enforceable tariff is imposed on appraisers for their services rendered in connection with expropriation proceedings, they are free to charge what the traffic will bear, but I will not be a party to passing those charges on in full to the taxpayer."

The first responsibility in this matter rests with the individual appraiser to find a proper balance between his assignment, the time spent and the fee charged. The total solution may have to await the formation of a single professional organization of appraisers in Ontario; this will be commented upon later in the report. One of the first undertakings of such an organization should be the study of a full tariff of appropriate fees chargeable to owners whose lands have been expropriated. The writers of such a tariff will be confronted with a view uniformly held by appraisers in Ontario that the value of the property has nothing to do with the quantum of their fees. This view has been consistently maintained by appraisers in the Taxing Office at Toronto, and is presumably defended on ethical grounds. Appraisers feel that if their fee should depend on the quantum of the valuation, their objectivity might be suspect. This should raise no more suspicion than their receiving a fee from an owner who is benefited by a high valuation.

The view that appraisers should work rigidly to an hourly or daily rate without regard to the amount of the valuation is maintained *ad absurdum,* and is of long standing. Eighteen years ago the writer of this report saw an appraiser's account for $1,200.00 to value a property at $800.00, and this year was shown an account for $1,650.00 to value a property at $1,000.00. The sadness of these examples is the implication that some appraisers cannot or will not give inexpensive service to the small assignment. When full professional status is achieved, this situation will have to be remedied.

For guidance in the matter of fees it is useful to consider the Tariff of Professional Charges of The Royal Institution of Chartered Surveyors, applicable to English appraisers. The present scale of fees for expropriation cases is shown in appendix "A" at the end of this report. It reveals several points of interest.

First, the fee for pre-trial work is strictly related to the amount of compensation settled or determined by The Lands Tribunal. The number of days being irrelevant, over-preparation is unlikely; in any event it is not paid for. Similarly, elaborate reports in the American tradition are uncommon, partly because the valuator cannot afford to prepare them. The client receives a concise statement of relevant matters, which is usually all he wants anyway, and the mass of detail remains with the appraiser's rough notes until needed.

Second, the fee does not rise in proportion to the rise in compensation. The fee for a £1,000 case is £37.80; the fee for a £10,000 case is £132.30.

Third, even the smallest case can be accommodated in the tariff. An appraiser receives £10.50 on a £100 case, and he never receives less than £7.50.

Fourth, the appraiser's fee for attendance before the Lands Tribunal is variable and reflects his qualifications and professional status. No scale of fees is applied.

**RECOMMENDATIONS**

5. *A tariff of fees is a useful regulatory instrument for appraisal work up to the time of the hearing. It is recommended that an Ontario tariff be established. This can be accomplished by the appraisers themselves or by regulation under section 45(d) of The Expropriations Act. It is not felt that tariffs for planners, accountants, engineers, quantity surveyors or other consultants are necessary.*

The overpreparation of compensation cases by lawyers is a matter of serious concern. The lawyer undertakes general supervision of the preparatory work whereas most of the time-consuming, detailed research is performed by the expert consultants; it had not been foreseen, therefore, that accounts of unusual size would be rendered by solicitors for preparation prior to the hearing. The largest was for 800 hours' work; this translates into a lawyer's total billable time for eight months. Often these large accounts reflect an attitude that since the client will be reimbursed by the authority, (i.e. the public), any amount of preparation is justified. As one counsel has expressed it, he feels entitled to prepare an expropriation case without regard to the amount in issue, and without any limitation on the number of hours spent. There are conferences to discuss strategy. There are extensive meetings with experts searching for ways to establish a potential value. There is duplication of work by solicitors in a firm. A style of preparation has developed which seeks to be ingenious and imaginative rather than to produce a straight-line, focused effort. Minute searches are undertaken for flaws in the expropriation procedure, as a basis for pressure. There is a failure to exercise firm control of costs.

It is the extreme cases that have just been described, but they have arisen often enough to create a problem, and to downgrade the effectiveness of the statute. They must be carefully distinguished from those cases legitimately requiring preparation of unusual length, cases which involve numerous detailed issues and extensive legal research. These are likewise frequent.

As a general principle, an expropriating authority should have to pay solicitor and client costs reflecting economical and straightforward preparation. Service beyond that should be paid for by the client, if he wishes it.

The problem has not been dealt with successfully. It has proved difficult and frustrating for Taxing Officers throughout Ontario to tell lawyers they have undertaken unnecessary work and have failed to use their time economically. One general conclusion is that taxations of owners' costs have been insufficiently governed by the degree of success achieved. It is not felt that a tariff would be particularly helpful. Legal fees reflect not only the size of the case but also the degree of success achieved; the latter consideration cannot be introduced into a tariff. The number and complexity of the legal issues vary greatly from case to case, and these are also difficult

to regulate by fee scales. Any tariff would have to be open ended, providing only for the average case; this feature removes its usefulness for the unusual case, where in fact the problems reside.

Nevertheless it is felt that *specific* guidance should be provided for the determination of the reasonableness of an owner's legal costs.

6. *It is recommended that a regulation be passed under section 45(d) providing that a taxing authority shall consider, inter alia, in taxing legal fees:*

   *(a) the size of the case;*

   *(b) the actual amount in issue;*

   *(c) the degree of success, as shown by the relationship between the offer, the claim and the award;*

   *(d) whether the case was prepared and conducted in a straightforward and economical manner;*

   *(e) that the taxed costs are paid out of a public fund entitled to proper protection;*

   *(f) whether, owing to the nature of the service rendered, some of the costs listed on the bill should properly be borne by the owner himself.*

It has been suggested that the Land Compensation Board is in the best position to award costs, having heard the case. The Board has the power at present to fix the costs in a lump sum, but does not exercise it. While the Board could deal easily with the costs of the hearing, it has no advantage as to costs incurred prior to that time. The Board has adopted a practice of commenting on the evidence and the conduct of the hearing in order to guide the taxing officer in his consideration of the 'reasonableness' of the costs. This is an extremely useful practice and should be continued.

7. *It is recommended that the costs of any proceedings in the Divisional Court and the Court of Appeal should be in the discretion of those Courts.*

8. *An appeal should be provided from a taxation of costs by a taxing officer under section 33 in the same manner as from a certificate of a taxing officer as provided in the rules of the Supreme Court.*

Section 29(2) prohibits the calling of more than three witnesses to give opinion evidence without leave. Usually two real estate appraisers are called to deal with the value of the land taken and the land injuriously affected. In England only one expert may be called unless otherwise ordered, upon motion, for special reasons (a further witness may be called in respect of minerals or business disturbance).

The McRuer Report stated:

"A profession of surveyors has been developed in England. They are highly skilled in making valuations with a knowledge of all the

elements that should be taken into account. That such witnesses would be available throughout Ontario when required is questionable. It may well be that it would be a hardship to restrict the parties to one expert in the first instance. Different elements in the valuation of a claim may have to be considered, e.g. construction costs, business disturbance, planning, zoning and other aspects of land use control. Until there are in Ontario sufficient numbers of qualified appraisers, two experts should be permitted to give evidence without special leave."

At the present time there seems little need for a party to call more than one appraiser for the valuation of a residence or any property of roughly comparable value; many valuators express the view that a single appraiser is sufficient in any case. These statements presuppose that the appraiser is qualified to perform a cost approach without the assistance of a quantity surveyor, who would be a necessary second witness.

9. *For the present it is recommended that:*

   (a) *where the claim filed with the Land Compensation Board in respect of land value plus injurious affection to land remaining does not exceed $60,000.00, not more than one real estate appraiser may be called as a witness by either side; and*

   (b) *where an award of compensation for land taken plus injurious affection to land remaining does not exceed $60,000.00, the costs of a single real estate appraiser only may be awarded.*

It occasionally happens that the parties can settle the compensation but not the costs. At present it is necessary to request the Land Compensation Board to give a consent order directing a taxation. This seems an unnecessary step.

10. *It is recommended that jurisdiction be given to the taxing officer of the Supreme Court to tax costs upon an agreement as to compensation following expropriation, as upon a reference from the Board.*

## CHAPTER IV

## LAND COMPENSATION BOARD

Prior to the present statute, the determination of compensation resulting from land expropriation was entrusted to a diversity of tribunals, making uniformity of procedures and awards difficult to accomplish. This was the principal reason for the establishment of the Land Compensation Board as a single tribunal to perform this function within Ontario. It commenced operation in December, 1970, and has heard 119 cases up to September 30, 1974. Appendix "B" to this report is a summary of the amounts claimed in those cases and the amounts awarded. It is apparent from the figures that the Board is required to deal with very substantial sums of money. The hearings have occupied from 1 to 35 days, with the majority lasting from 2 to 5 days. Decisions are given in writing and the Board's objective is to produce them within a month.

Eighteen decisions have been appealed, with 3 appeals abandoned. Of the 8 appeals which have been argued to date, 6 have been dismissed; the appellate courts have strongly supported the Board's decisions. Taken overall, the amounts of compensation awarded by the Board are regarded as fair.

### STRUCTURE

The McRuer Report suggested, but did not recommend, that the Board should consist of at least seven members, three of whom should be lawyers and the others real estate appraisers. The model was clearly the English Lands Tribunal.

Appointed to the Board were three lawyers and seven other members, one of whom is now deceased. With the present complement of nine, it is possible for three panels to function at one time, the quorum being three. The members are not real estate appraisers; they have extensive experience in the commercial, assessment, agricultural and public service fields.

This study does not support the view that the Board should consist only of qualified lawyers and appraisers. Lawyers are needed for the judicial conduct of hearings and for guidance on questions of law. Three have proved sufficient for these purposes.

As to questions of fact, the Board's decisions are based on the evidence presented, and such decisions can be made without all non-lawyer members possessing the qualifications of a real estate appraiser. Nevertheless, as can be seen from Appendix "B", almost 97% of the total amounts awarded by the Board constitute determinations of market value and injurious affection. Such determinations were based on evidence presented by appraisers. Such evidence is often extremely complex, especially when income valuations and residual methods are employed.

It is impossible to believe that the Board would not be strengthened by a member who has practised as a qualified real estate appraiser. His

daily availability for discussion would enhance the Board's expertise. It is not suggested that more than one member appraiser would be desirable. A Board too heavily weighted with valuators might well tend to decide cases on its own resources of knowledge and prejudice of method rather than the expertise of the witness.

Essential to the fullest realization of the Board's function are other backgrounds of training. Many cases involve a calculation of business disturbance, loss of profits, and good will. An accountant member of the Board for such cases could provide great service.

Many claims, usually involving large amounts, require the valuation of a property's potential for development and the likelihood of obtaining zoning and subdivision approvals. The appointment to the Board of a person who had practised in the municipal and provincial planning field or in land development would extend its range. The same comments would apply to a member who had practised as an engineer, although engineering issues are less frequent in compensation cases.

Appendix "A" to the Report of the Select Committee on the Ontario Municipal Board, November, 1972, lists the prior occupations of the members of that Board as including lawyers, accountants, a planner and an engineer; and the following recommendation was made:

> "When new appointments are being made to the O.M.B., special attention should be paid to the candidates' previous experience and its relevance to the Board's work. The object should be to widen the variety of relevant occupations and general backgrounds among the Board members."

The wisdom of the recommendation is obvious.

At present there is a marked status gap within the Land Compensation Board between the lawyer and non-lawyer members; the gap appears to be increasing with time, and it is undesirable for morale and efficiency. Every effort should be made to upgrade the role of the non-lawyer members.

## FUNCTIONS

The comment has been made in this report that some expropriating authorities, through the 'buy at any price' philosophy, are avoiding the expropriation process with its present costs and delays. This involves an avoidance of the Land Compensation Board, and may account for the fact that there is no annual increase in the applications which it receives. The non-lawyer members have stated that they desire a fuller utilization of their services. All the Board's decisions have been written by the Chairman and Vice-Chairmen, i.e. the lawyers, who have been greatly burdened. Every possible consideration should be given to assigning some of this function to the other members. Non-lawyer members of the Ontario Municipal Board have been writing decisions for years. The Land Compensation Board orders and relies on written transcripts of the evidence, perhaps to a greater extent than any other tribunal, the Tax Review Board having abandoned the practice fairly recently. Decisions of the Land Compensation Board are remarkable for their meticulous accuracy and amplitude of detail, but the

thought arises that since three note-takers occupy the bench at each hearing, a co-operative decision-writing process might perform a double usefulness.

The possibility of assigning other duties to the Board, in order to utilize its services more fully, has been under consideration for some time, and three members were this year appointed to constitute the Farm Tax Reduction Review Board.

Consideration has been given to utilizing the Board in the assessment appeal process, but since the thrust of the market value assessment programme will not be felt for at least two years, immediate utilization is not practical. When the programme is fully implemented, there may initially be as many as 40,000 appeals at the level of the county court judges and 4,000 at the Ontario Municipal Board level. It is obvious that the Land Compensation Board structure would have to be totally revised and multiplied to hear such volumes of cases. Assignment of assessment appeal functions to the Board is premature for other reasons. An initial decision has to be made whether the appeal process will be single-or double-tiered, and whether appeals will be *de novo* or from transcripts of evidence. The Select Committee's Report on the Ontario Municipal Board contains the following recommendations, as yet unimplemented:

> "Assessment appeals should be made directly from the Assessment Review Court to the OMB and no longer be heard by county or district judges. Consideration should be given to forming a separate division of the OMB for hearing assessment appeals.
>
> "If it is anticipated that the volume of appeals would be too great for the OMB under this new arrangement (taking into consideration that the Board's workload should be reduced considerably in other ways) then a separate assessment appeal board should be established, either as a new body or as an appellate division of the Assessment Review Court and it should be given the same jurisdictional power as has been recommended here for the OMB."

It is not the intention of the present study to counter this recommendation, which, it is noted, does not place the Land Compensation Board in the assessment appeal process. The Assessment Review Court is already fully organized with a large established membership, including regional registrars, and is preparing itself for the forthcoming deluge of appeals. Consideration will no doubt be given by the government to the desirability of building an appeal division from this foundation.

What should be said in this study is that since the determination of the market value of land is the major portion of the Board's work, and since its present function is almost purely judicial, it is eminently suited to participate in the assessment appeal process, should its services be required.

These reasons also indicate that the Board is qualified to take over the function of value determinations under other Ontario statutes. The work of the Board has included not only the valuation of land and buildings but also businesses as going concerns, good will and other business assets. The determination of the value of company shares and of personal property

generally would be a natural extension of the Board's present experience, especially with the appointment of members of other backgrounds as outlined earlier. Such value determinations have been assigned to the Supreme Court in the following statutes:

1. The Ontario Succession Duty Act (section 33),
2. The Ontario Gift Tax Act (section 30), and
3. The Ontario Corporations Tax Act (section 155).

It is understood that the volume of appeals under these statutes has not been great; however,

4. The Land Transfer Tax Act, 1974 (section 14), and
5. The Land Speculation Tax Act, 1974 (section 10) also provide for appeals to the Supreme Court and a significant volume may well arise as experience under these statutes develops.

This study has reached the conclusion that the jurisdiction to hear appeals from assessments under the said five statutes should be transferred to the Land Compensation Board because of its special experience in valuation.

It is felt that the terms of reference extend to a consideration of the desirability of restoring Ontario's compensation cases to the Ontario Municipal Board, or transferring them to the Supreme Court as has been done in other provinces. The reasons given in the McRuer Report for the establishment of a single tribunal to hear these cases are almost equally valid to-day. It was felt in 1968 that the Province would be best served by an independent compensation tribunal exercising a purely judicial function, "with no room in its decisional process for the introduction of government policy", and without the distraction of other duties at variance from its main function. The Board's functions have in fact been judicial, independent and concentrated.

It is concluded that the Land Compensation Board should be retained as the Province's single tribunal for compensation cases under The Expropriations Act.

QUORUM

In line with the recommendation contained in the McRuer Report, the chairman (or a vice-chairman) and two members constitute a quorum, but a member may sit alone for claims not exceeding $1,000. Since the Board has never received a claim under $5,000, the limit should be raised.

In England it is customary for a single member of the Lands Tribunal to sit alone, whether lawyer or appraiser, and it is not felt that a panel of three need be the rule in Ontario in view of the experience now achieved.

**RECOMMENDATIONS**

*It is recommended that the chairman (or a vice-chairman) and one member should constitute a quorum. The chairman may increase the panel as he wishes. For claims up to $25,000 one member should constitute a quorum.*

## HEARINGS ON CONSENT

Strong submissions have been received from expropriating authorities and claimants interested in a speedy determination where agreement as to price has not been possible, urging that the Board be given jurisdiction without the necessity of prior expropriation. This situation arises where the owner is willing to sell his land to the authority.

*It is recommended that by agreement of the parties, without an expropriation, the Board be given jurisdiction to determine compensation in accordance with the statute as if an expropriation had taken place.*

## MISCELLANEOUS

*Consideration should be given to amendments to the Act to provide*

*(a) for completion of a hearing where a member dies, is ill or is absent;*

*(b) that the chairman shall have general supervision and direction over the Board and shall assign members to conduct the sittings;*

*(c) for a vice-chairman to act in the chairman's absence;*

*(d) that no member of the Board shall be personally liable for anything done under the authority of the Act;*

*(e) for recording evidence and furnishing transcripts; and*

*(f) for fees for copies of decisions.*

## CHAPTER V

## MISCELLANEOUS

### APPRAISAL TRAINING

The effectiveness of an expropriation statute in the process of determining fair compensation depends on a knowledgeable tribunal and a skilful bar. It depends equally on a highly qualified body of real estate appraisers who are willing to give evidence of value. The appraisers of Ontario, who are an active, conscientious and intelligent group, have been performing a valuable service in this way for many years, yet there is a strong view that their numbers are not increasing to match the demands for their services. There is also an opinion that their advance to full professional status has been slow, partly because their organization remains critically segmented. A profession requires unity of organization. Until it is achieved, appraisers cannot speak with a single voice on fees, tariffs, ethics, education or qualifications. When a problem arises, there is no central organization to deal with it. The provincial government has been co-operating with Ontario appraisers in their achievement of professional status; it is hoped that this can be advanced more rapidly.

There is an immediate problem of education. At present the skilful appraiser gains his skills much more from practical than academic training in Ontario; he is usually a remarkable example to self-improvement. The opportunity for extensive academic upgrading is not available in spite of praiseworthy efforts by some associations and community colleges.

*It is recommended that the province give every possible assistance to the development of complete academic courses for appraisers at a community college or university.*

### ROAD CLOSINGS

Before The Expropriations Act came into force on December 20, 1968, damages arising from road closings could be claimed:

(a) by a combination of sections 459, 460 and 337 of The Municipal Act, R.S.O. 1960 ch. 249, and

(b) under section 37 The Highway Improvement Act R.S.O. 1960 ch. 171.

With the passing of The Expropriations Act the compensation provisions for road closings were deemed to have been included in and replaced by the injurious affection provisions of the new Act and therefore section 337 of The Municipal Act and section 37(6) of The Highway Improvement Act were regarded as obsolete. These latter two provisions have accordingly been dropped from the 1970 consolidation of statutes and are designated in schedule "B" of volume 6 as "repealed as obsolete".

If it is now necessary to resort to the injurious affection provisions of The Expropriations Act for compensation for road closings, principal reliance must be placed on the definition of injurious affection contained

in section 1(1)(e)(ii) which deals with damages "where the statutory authority does not acquire part of the land of an owner". One of the requirements of such damages is that they must arise "from the construction . . . of the works by the statutory authority". Unfortunately there is no construction involved in a municipal road closing since the public loses its right to use the road not as a result of the construction of a work but through the registration of the closing by-law under present section 443(6) of The Municipal Act, R.S.O. 1970 ch. 284. For the closing of a road under The Highway Improvement Act (now The Public Transportation and Highway Improvement Act) it is uncertain how the closing of the road becomes effective; it may involve construction, but this may not be necessary in all cases. The problem is that unless there is 'construction', compensation cannot be given under The Expropriations Act and, since the earlier statutory provisions have been repealed, an affected owner may be left without remedy. A further problem is the uncertainty about the effectiveness of a compensation claim under section 444 of the present Municipal Act, which also may require the provisions of The Expropriations Act.

**RECOMMENDATION**

*It is recommended that the road closing provisions of The Municipal Act and The Public Transportation and Highway Improvement Act be restudied, in relation to The Expropriations Act, to make certain that adequate provisions for compensation exist. The best solution may be to restore the earlier remedies.*

## DEFERRED ROAD WIDENINGS

The repeal of section 337 of The Municipal Act, R.S.O. 1960, ch. 249 has also affected claims for compensation for deferred road widenings. As pointed out in a decision of the Land Compensation Board, the effect of the repeal is to remove the right to claim compensation and the right to have the claim determined by arbitration.

**RECOMMENDATION**

*It is recommended that to entitle the expropriated owner to compensation and to give the Land Compensation Board authority to determine such compensation, section 1(1)(c) of The Expropriations Act be amended by deleting the words "but does not include the taking of land for the widening of a highway where entry is deferred under section 339 of The Municipal Act"*

## SECTION 1 — INJURIOUS AFFECTION

Injurious affection is the damaging effect caused by land expropriation and the construction and use of a public work, damages for which are governed by technical legal rules. These rules are incorporated within the definition found in Section 1(1)(e) of The Expropriations Act, as follows:

"injurious affection" means,

"(i) where a statutory authority acquires part of the land of an owner,

a. the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construcion of the works thereon or by the use of the works thereon or any combination of them, and

b. such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

"(ii) where the statutory authority does not acquire part of the land of an owner,

a. such reduction in the market value of the land of the owner, and

b. such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired."

The damages include both reduction in land value, and personal and business damages. The present statute adopted the pre-existing law with only one innovation: personal and business damages are recoverable, in certain circumstances, where no land has been acquired by the statutory authority.

A full academic study of the law of injurious affection as part of the relationship between the individual and the public in matters of planning and development will some day be undertaken. Without such a study this report will not make a recommendation regarding the construction-user rule reflected in the definition.

Section 1(1)(e)(i)a. incorporates a rule given modern expression in *Edwards* v. *Minister of Transport,* (1964) 2 Q.B. 134, to the effect that the injurious affection must arise from that portion of a public work actually

constructed on the parcel of land expropriated from the owner rather than from the entire public work. This is accomplished by the use of "thereon" in the definition. The High Court of Australia in *Commonwealth of Australia* v. *Morison* (1972) 46 A.L.J.R. 453 extended the rule by holding it to be applicable only where it is possible to isolate the depreciating factors upon the land expropriated. Almost as if the bond was broken, the English Land Compensation Act of 1973, one year later, was amended to abolish the *Edwards* rule altogether; the amendment reads:

> "Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him."

**RECOMMENDATION**

*It is recommended that the principle of the English amendment should be adopted in Ontario.*

The development of injurious affection has produced a distinction between those damages caused by the 'construction' of a public work and those caused by the 'user' of a public work. The distinction is retained in section 1. In Ontario it had been widely believed that 'construction' meant the existence of the public work after it was constructed. To make this meaning clear, the Manitoba statute has changed the phrase and adopted 'existence and use' rather than 'construction and user.' The ambiguity of the word 'construction' allows it to mean the act or process of construction, as well as the completed work. The Land Compensation Board in a strong decision, *Zadworski* v. *Minister of Transportation and Communications* 4 L.C.R. 100, has now concluded that the word 'construction' has both meanings for purposes of Section 1(1)(e)(i)b.

The implications of extending the meaning to include the course of construction are alarming to public bodies, especially those which own and maintain roadways. It is true that to incur liability for damages during construction upon roadways, the damages must be such "as the statutory authority would be liable for if the construction . . . were not under the authority of a statute"; nevertheless the *Zadworski* decision shows that such liability can readily arise where there is interference with access to private land. It can also arise where there is obstruction of a road or highway causing special damage, different from that suffered by the public generally.

Public authorities now fear that when they must reconstruct a roadway, or dig it up to install a public service, they will be met with claims of adjoining owners for business disturbance during construction, even though the owners may well be benefited by the work when it is completed. Indeed a rash of such claims has already arisen since the *Zadworski* case. The authorities point out that public works deteriorate and must be repaired from time to time, and that whose who enjoy the advantage of the work must expect occasional interruptions with accompanying temporary business disturbance. This seems particularly applicable in the case of business premises dependent on adjacent roads and services of high quality. Public

authorities should be free to undertake projects and works without fear of the expense of damage claims during construction properly carried out. Adjoining owners will still retain their common law actions for damages where the construction is carried out negligently, or for an unreasonable duration, or in an unworkmanlike manner.

**RECOMMENDATIONS**

1. *It is recommended that damages for injurious affection should exclude damages during the course of construction of the work but should continue to include damages after the completion of construction.*

2. *Section 1(1)(e) includes 'personal damages' as well as 'business damages.' The phrase 'personal damages' is found in no other section of the act, and is confusing and indefinite in compensation law. The aim is to cover all economic loss, and the simple, traditional word 'damages' is to be preferred. It is recommended that 'personal and business damages' be amended to read 'damages.'*

SECTION 5 — APPROVING AUTHORITY

It is the Minister of Energy who makes recommendations to Cabinet for the giving of consent to Ontario Hydro to acquire land under The Power Commission Act. The same Minister should be the approving authority under Section 5(4) rather than the Minister of the Environment.

SECTION 6 — NOTICE OF INTENTION TO EXPROPRIATE

The present system of initiating the expropriating procedure is cumbersome. Notice of intention to expropriate is given to certain persons who have little interest in receiving it. It is the owner of land who is in actual occupation or has it rented, who is primarily interested in hearing of the intention to expropriate. A mortgagee has little reason to challenge the taking. On the other hand, notice of the actual expropriation, once it has taken place, should be extensively given.

Several submissions have complained about the duplication involved when a reference plan is filed for the notice of intention, followed later by the registration of an expropriation plan. This double expense is avoided by the procedure in Part I of the federal Expropriation Act, which requires a plan followed by a notice. It is a better procedure and should be adopted in Ontario.

Triple publication, in addition to service, is unnecessary and should be reduced. The notice of intention should be registered to warn persons subsequently dealing with the land.

**RECOMMENDATIONS**

*It is recommended that a procedure be adopted which will include the following steps.*

1. *registration of a notice of intention to expropriate,*

*setting forth a description of the land, the interest to be taken, and an indication of the public project or work;*

2. *simultaneous registration of a plan of the land to be expropriated;*

3. *the notice should within 30 days be published at least once, and served upon the 'registered owner' as defined in the Act but excluding mortgagees, lienholders, and execution creditors;*

4. *after approval of the expropriation, notice of approval should be registered, at which time the land described in the approval vests in the expropriating authority; where a reduced area of land is approved, a revised plan will be registered.*

*It is recommended that for assurance of title, the statute should contain a provision somewhat similar in effect to section 21 of The Expropriation Act, 1974, Statutes of Alberta, chapter 27, which reads:*

*"Registration of the certificate of approval is conclusive proof that all the requirements of this Act in respect of registration and of matters precedent and incidental to registration have been complied with."*

*This section however is too stringent; an owner, for example, not notified of the intention to seek approval should not be barred from challenging the proceedings. This matter is dealt with under section 44.*

## TIME PERIODS

**RECOMMENDATION**

*Complaint has been made about confusion caused by specifying time limits variously in months and days. For uniformity it is recommended that "three months" in sections 9(1), 25(1), and 40(2) should be changed to "90 days."*

## SECTION 10 — ELECTION OF DATE FOR COMPENSATION

In all cases the owner has 30 days to elect to have compensation assessed as of the date of service of the inquiry hearing, or of the registration of the plan, or of service of the notice of expropriation. This has not proved useful or significant, yet causes considerable delay; usually the expropriating authority must patiently await an election which never arrives. There is no reason for an election to be given to a mortgagee. Considerable confusion can arise when the owners of various interests elect different dates.

Confusion has also arisen through the provision that compensation, presumably all compensation, shall be determined as of the date elected. Certain damages should be assessed as of a later date. The section would

be improved if the date of determination should apply to the valuation of land rather than 'compensation' generally.

**RECOMMENDATION**

*It is recommended that the date of assessing the market value of the land expropriated and injurious affection to the land remaining should be the date of registration of the plan of expropriation or the proposed notice of approval, under section 9, except that,*

*(a) where service of the notice of expropriation is late, the owner may elect, within 30 days of service, to have the assessment as of the date on which he was served; and*

*(b) where the notice of expropriation is not served, the owner may, not later than the date of service of his claim in proceedings before the Land Compensation Board, elect the date on which he gave up possession of the land.*

SECTION 13 — COMPENSATION

It is section 13 that incorporated the major decision to discard the value to the owner principle and to substitute market value plus damages. The decision has proved satisfactory except for one possible omission. That aspect of value to the owner which recognized a special economic advantage in the relationship between the owner and his land, seems not to be adequately covered in section 13. It is included in section 24 (3) of the federal Act in these words:

> "plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land . . ."

The 1973 New Brunswick Act adopts the federal wording and substitutes it for the words "any special difficulties in relocation" in section 13(2)(d). It is also adopted in the 1973 Nova Scotia statute.

**RECOMMENDATION**

*It is recommended that a clause (e) be added to section 13(2) to provide compensation for special economic advantage to the owner arising out of or incidental to his occupation of the land.*

*With other suggested amendments, it is recommended that section 13(2) be amended to read:*

*"Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon:*

*(a) the market value of the land;*

*(b) damages arising from the expropriation;*

*(c) injurious affection;*

*(d) any special difficulties in relocation; and*

*(e) any special economic advantage to the owner*

*arising out of or incidental to his occupation of the land,*

*but, where . . .*"

*It is further recommended that compensation be payable under section 13(2)(b), (d) and (e), and section 19 only if the land was not being offered for sale on the date of expropriation.*

An owner is not entitled to compensation for improvements made to land after the date of expropriation. It is uncertain whether he is entitled to such compensation if the improvements were made after he was aware of the likelihood of acquisition but prior to the date of expropriation. It can be argued that as long as the owner retains title he should be free to do as he wishes with his land, since the planned expropriation may well be abandoned.

**RECOMMENDATION**

*It is recommended that compensation should not be payable for improvements made to the land after service of the notice of intention to expropriate.*

SECTION 14(2) — EQUIVALENT REINSTATEMENT

The Report of the Ontario Law Reform Commission states at page 20: "The doctrine of equivalent reinstatement was developed at common law in order to do justice where the ordinary methods of valuation would not provide adequate compensation where there was no market for the property owing to the particular purpose to which it was put. Land used for churches, schools and hospitals has been treated in this way. The doctrine is at present part of the law of Ontario."

Section 14(2) adopts almost verbatim the recommendation of the Commission as to reinstatement.

Complex and elaborate arguments have been made in several cases, where it was sought, in particular factual situations, to obtain the benefit of equivalent reinstatement under section 14(2). The first problem is to decide the kind of property which qualifies under the opening clause of the section; in this regard, the words "devoted to a purpose" have caused trouble. The second problem is to decide what "equivalent reinstatement" means. The theory is that since such properties are not bought and sold, there is no market from which to deduce their value and therefore no effective valuation can be made. Does the phrase mean anything more than specific permission to employ the cost approach to valuation, which values the land and buildings separately? Since a value can invariably be given to the land if considered separately from the building, is there any room for a consideration of the amount actually paid for a substitute lot? If reinstatement involves the construction of a new building, then how does proper compensation take into account the possibility of enrichment?

The 1974 Alberta statute has given recognition to some of these problems, and contains a section which greatly elaborates upon the Ontario model; it reads:

"44. (1) Where any land has any building or other structure erected thereon that was specially designed for use for the purpose of a school,

hospital, municipal institution or religious or charitable institution or for any similar purpose, and the use of the building or other structure for that purpose by the owner has been rendered impracticable as a result of the expropriation, the value of the expropriated interest is, if the expropriated interest was and, but for the expropriation, would have continued to be used for that purpose and if at the time of its taking there was no general demand or market for the building or structure to be used for that purpose, the greater of

(a) the market value of the expropriated interest determined as set forth in section 39, or

(b) the aggregate of

(i) the cost of any reasonably alternative interest in land for that purpose, and

(ii) the cost, expenses and losses arising out of or incidental to moving to and re-establishment on other premises, minus the amount by which the owner has improved, or may reasonably be expected to improve, his position through re-establishment on other premises.

" (2) For the purposes of subsection (1), clause (b) the cost of any reasonably alternative interest in land shall be computed as of the date at which construction of the new building or the structure could reasonably be begun."

An interesting comparison is provided in the 1973 New Brunswick statute:

"39. (2) Where the land expropriated had a building erected thereon that was used for purposes of a school, hospital or religious or charitable institution or for similar purposes, and

(a) the use for that purpose would have continued but for the expropriation,

(b) there is no general demand or market for the land and building for that purpose, and

(c) the owner intends in good faith to relocate in similar premises, the market value shall, at the option of the owner, be deemed to be the reasonable cost of equivalent reinstatement less the amount by which the owner will have improved or may reasonably be expected to improve his position through relocation on other premises."

**RECOMMENDATION**

*It is recommended that, to achieve a greater certainty of intent, section 14(2) should be replaced by a section following the Alberta model, with one change, namely, that the compensation should not include 'the cost of any reasonably alternative interest in land' but should include the value of the land expropriated, appraised as a vacant parcel without buildings.*

It is recognized that the appraisal problems under such a section are extremely difficult.

## SECTION 14(3) — BEFORE AND AFTER METHOD

The 'before and after method' of valuation has been approved in the Supreme Court of Canada; it has been commonly used for years. The Report of the Ontario Law Reform Commission commented upon it as follows:

> "Initially, the procedure for determining compensation in partial taking cases consisted of taking the value of the lands expropriated and then adding to that sum the damages occasioned to the lands retained. However, it was soon realized that a more accurate method would be to value the whole parcel before expropriation and subtract from that sum the value of the remaining lands, taking into account any benefit or detriment to those remaining lands resulting from the project for which the expropriation was made. This latter method of working out compensation is referred to as the 'before and after' test and is now used by the courts in all cases where it is practical to do so. There is one instance where it is not used; where a very small percentage of the land is taken, the value of the remainder may not change. In such a case, the authorities pay compensation on the basis of the lands taken and not on the basis of the injury to the owner's entire holding."

A second qualification involves the deduction of benefits under section 23, which limits the full usefulness of the method.

It was probably not necessary to enact section 14(3), but merely to let the common practice continue. Unfortunately, the opening words,

> "Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market"

can be regarded as a strict limitation, with the result that where the part taken could be sold on its own as a separate parcel, the method is prohibited. This can lead to unfairness where the part taken is valuable as a part of the entire property, but on its own is worth little. Such unfairness was commented upon in *Re Don River Heights Ltd. and Metropolitan Toronto & Region Conservation Authority,* [1969] 1 O.R. 445.

The use of the 'before and after method' should depend on the facts of the case involved.

**RECOMMENDATION**

*It is recommended that section 14(3) be repealed.*

## SECTION 15 — HOME FOR A HOME PRINCIPLE

Section 15, which reads:

> "15. Upon application therefor, the Board shall, by order, after fixing the market value of lands used for residential purposes of the owner under subsection 1 of section 14, award such additional amount of compensation as, in the opinion of the Board, is necessary to enable the owner to relocate his residence in accommodation that is at least equivalent to the accommodation expropriated. R.S.O. 1970, c. 154, s.15."

was intended to give effect to the 'home for a home' principle in circumstances arising principally under urban renewal schemes where housing was expropriated in blighted or substandard areas. Persons losing their homes were often faced with higher prices for substitute properties on the periphery of the development, probably inflated from the demand created by the expropriation itself.

The section was not intended to cover expropriations in well-to-do areas and yet no limitation is included. Section 40 of the 1973 New Brunswick statute makes the intended limitation clear by authorizing an additional allowance where the Board is of the opinion that "a special hardship will be imposed upon the owner in obtaining accommodation suitable to his needs."

**RECOMMENDATION**

*It is recommended that section 15 be amended to provide that the award of additional compensation be allowed only in cases where a special hardship exists for an owner in relocating his residence.*

SECTION 16 — SEPARATE INTERESTS

This section requires the valuation of separate interests in land except for the interest of a security holder or a vendor under an agreement for sale. The principle has been adopted for compensation in Ontario that the actual market value of a mortgage is not relevant.

Caution has led Alberta to insert the words "where practical" into the section. Where it is not practical, presumably the practice is for all interests to be represented at the arbitration at which value will be determined in a lump sum and paid into Court, for division as the Court directs.

It is not the practice for an inchoate dower interest to be valued separately; in most cases it is unnecessary. The Land Compensation Board has adopted the practice of requiring a wife with a dower interest to be notified of the hearing and to be made a party claimant if she wishes. If her interest should be valued separately, the Board has no power to direct the sum so valued to be reserved and invested. An expropriating authority, faced with a request by a wife that a sum equal to the value of the dower interest be reserved, would probably pay the compensation into Court and avoid the problem.

**RECOMMENDATION**

*It is recommended that the words "where practical and required" be added to the section.*

SECTIONS 17, 20 — MORTGAGES

As already stated, the Act does not contemplate that the market value of a mortgage should be determined; instead, the mortgagee's entitlement is based on the outstanding balance of principal and interest. This is to be paid out of the market value of the land and "any damages for injurious affection." It was probably intended that "any damages" should mean the reduction in value of remaining land, and should not include the "personal and business damages" aspect of injurious affection.

**RECOMMENDATION**

*It is recommended that the words "any damages for injurious affection in section 17(2)(b), (3) and (6) should be replaced by the words "injurious affection constituting a reduction in market value under section 1(1)(e)(i) and (ii)."*

Since the principal and interest are paid out of the compensation it is desirable for the mortgage to be paid off as soon as possible.

**RECOMMENDATION**

*It is recommended that the statute direct the expropriating authority to pay to the mortgagee the compensation to which he is entitled with all reasonable speed, and direct the mortgagee to supply a proper mortgage statement to the expropriating authority promptly on demand.*

Section 17(4) provides for relief to a mortgagor where the market value and injurious affection are insufficient to satisfy the entire mortgage obligation. This may seem an undue hardship on the mortgagee in a falling market. However, the principles behind the enactment were carefully considered in the Report of the Law Reform Commission and adopted by the legislature. It is not felt that conditions have changed sufficiently for new recommendations to be made at this time.

A serious problem arises where land is sold at an inflated price, which is compensated for by a mortgage back at very reduced interest rates. In reality the principal amount of the mortgage includes a component for interest. Upon expropriation, the excessive principal amount would be payable out of the compensation and this seems unfair to the mortgagor. This situation is accounted for in the Manitoba statute and a corresponding provision should be enacted in Ontario.

**RECOMMENDATION**

*It is recommended that where the amount outstanding on a mortgage is greater than the compensation available to satisfy it, the balance should be discharged, where the debt arose in respect of the purchase price payable for the land, to the extent that the purchase price exceeded the market value of the land at the date of purchase.*

Section 20(c) provides compensation for a mortgagor for loss incurred by reason of a difference in interest rates. *Netto Holdings Ltd.* v. *Sudbury* 4 L.C.R. 298 makes it clear that the compensation is payable even though the mortgagor has not in fact given a new mortgage at a higher rate. No recommendation will be made to counteract the effect of this decision because the mortgagor has lost an asset whether or not he takes on a new mortgage at a higher rate. The calculation of the compensation is made difficult because of changing interest rates during the period of the calculation; it should be simplified.

**RECOMMENDATION**

*It is recommended that for the purposes of section 20(c) the "new interest rate" should be the interest rate prevailing at the date of expropriation.*

A submission has been received to the effect that it is unfair for an expropriating authority to have to pay compensation to a mortgagor based on his favourable interest rate, when a corresponding deduction cannot be made from the mortgagee's entitlement. Similar unfairness results when a mortgagee is compensated under section 20(b) without a deduction from the mortgagor. This is the inevitable result of the decision not to adopt the principle of paying the market value of a security interest rather than the principal and interest outstanding. This decision was taken by the Ontario legislature after careful study by the Law Reform Commission and in accordance with its recommendation. Application of the principle has numerous advantages (such as simplification of the appraisal process) as well as disadvantages (such as the one under discussion), and it is not proposed that the present law be disturbed.

Section 20(a), which provides for a bonus to mortgagees, applies readily to an open mortgage with a provision for notice or bonus on prepayment, but is extremely difficult to apply to a mortgage, open or closed, without such provision.

**RECOMMENDATION**

*It is recommended that section 20(a) be amended so that it clearly confers a benefit on the owner of a closed mortgage, and withholds a benefit from the owner of an open mortgage without provision for notice or bonus.*

SECTION 18 — DISTURBANCE DAMAGES

Section 13(2)(b) provides for compensation based upon *damages* attributable to disturbance; section 18(1) on the other hand, provides for payment, in respect of disturbance, of such reasonable *costs* as are the natural and reasonable consequences of the expropriation. The distinction made between disturbance "damages" and disturbance "costs" has led to confusion.

**RECOMMENDATION**

*It is recommended that the word "costs" in the phrase "such reasonable costs" should be changed to "damages", and section 18(1) should commence "The expropriating authority shall pay to an owner, other than a tenant, in respect of damages arising out of the expropriation, such reasonable damages as are the natural and reasonable consequences of the expropriation . . . "*

Corresponding amendments should be made to section 18(2).

The provisions of section 18(2) are taken directly from the recommendations of the Report of the Ontario Law Reform Commission. These recommendations clearly referred to tenants with leases for a term certain. There has always been doubt whether section 18(2) applies to weekly or monthly tenancies; the phrases "length of the term" and "portion of the term remaining" are inapplicable to such tenancies, whereas the definition of "tenant" is broad enough to include them.

If section 18(2) is narrowly interpreted, then periodic tenants are excluded from the damages provided for. In many cases, weekly and

monthly tenants receive only nominal damages, and many expropriating bodies would like the authority to pay a contribution toward moving and relocation costs. It is suggested that compensation equal to 3 months' rent would be appropriate.

**RECOMMENDATION**

*It is recommended that section 18(2) be amended so as clearly to apply only to tenants under a lease for a term certain, and that a new subsection be added providing for a payment of compensation to tenants not under a lease for a term certain, of an amount equal to 3 months' rent.*

## SECTION 19 — BUSINESS LOSS AND GOOD WILL

Section 19 provides for compensation for business disturbance caused by an expropriation, dealing separately with businesses which are able to relocate and businesses which terminate.

The law has almost universally provided compensation for business losses during the period of relocation. Compensation has likewise been given for the diminution or extinction of good will. No statute has defined good will, but the Land Compensation Board has accepted a submission made to it that good will is based on the excess profitability of a business over and above a normal return on invested capital. The law is not clear whether damages are payable if a business was making a normal return on investment prior to the expropriation, but, after relocation, was making less than a normal return. It is felt that compensation should be paid in such circumstances, even though the business technically had no good will.

A more difficult situation arises where a business was operating at a loss prior to expropriation and after relocation was experiencing greater losses. In addition there may be businesses where the total value of the enterprise does not exceed the liquidation value of its assets. Disturbance to businesses like these should not result in compensation for business loss.

It is not felt desirable to attempt to categorize in a statute all the various situations or all the various approaches to business loss and good will; these should be left to the good sense and discretion of the arbitration tribunal and will depend on the circumstances of each case.

Basically, section 19 is workable but would be improved by additions to provide for a termination allowance where relocation is not feasible through the age or ill-health of the owner and to specify that the determination of business losses must include a consideration of the length of time the owner might reasonably have been expected to remain in the premises, had the expropriation not taken place. Convincing reasons for a termination allowance were given in the Law Reform Commission Report at page 38.

**RECOMMENDATIONS**

1. *It should be made clear that section 19 is an amplification of the damages referred to in section 13(2)(b) and not an additional item of compensation. The words "as*

*damages arising out of the expropriation" should be added after the word "compensation" in sub-sections (1) and (2) of section 19, in order to refer back to section 13.*

2. *A sub-section should be added to section 19 providing that in determining the compensation regard shall be had to the period for which the land occupied by the owner may reasonably have been expected to be available for the purpose of his business. This provision is required for section 19(1) as well as 19(2) in order to provide for a business occupying leasehold premises and for a situation where the business might have had to relocate in any event for larger accommodation or other reason.*

3. *It is recommended that a termination allowance be payable in the descretion of the Board to the owner of a small business who is unable to relocate through reasons of advanced age or ill-health; but such allowance is not to be paid where compensation is awarded under section 19(2) or were the owner disposes of any part of the good will.*

SECTION 22 — LIMITATION PERIOD

Limitation periods of various degrees of strictness are imposed in the Federal statute and also in the statutes of Alberta, Manitoba, Newfoundland, Nova Scotia and Saskatchewan. In order to prevent stale claims, some form of limitation period is felt to be desirable. It is also needed in recognition of the fact that for orderly operation an authority with an outstanding claim against it should be able to bring it to finality. The writer of the report has always been of the view that section 22 should not apply to a claim for injurious affection where land has been acquired from the owner.

**RECOMMENDATIONS**

1. *If an owner has received the statutory offers under section 25 of the statute, and no claim for compensation is filed with the Board within 2 years after receipt thereof, then the sum offered shall be deemed to have been accepted in full settlement of compensation and no proceedings for compensation shall be brought.*

2. *A claim for injurious affection where the statutory authority does not acquire part of the land of an owner shall be made by the owner in writing with particulars of the claim within 1 year after the damage was sustained or after it became known to him, and if not so made, the right to compensation is forever barred.*

SECTION 23 — SET-OFF

Section 23 provides for a set-off against "damages for injurious affection" of any advantage to the owner's land derived from the public work.

There is an argument that "damages for injurious affection" do not include the "reduction in market value" element contained in the definition of injurious affection, but only personal and business damages. This result was not intended and arises merely from the drafting of the definition.

The section does not make it clear that both special and general advantages may be deducted and any doubt should be removed. There is old case law to the effect that only special benefits should be offset; however, the Ontario cases do not really consider the matter because the argument has been raised very seldom and also because cases under the Exchequer Court Act have provided for a complete set-off of all benefits. Several cases under The Municipal Act allow the deduction of both special and general benefits.

**RECOMMENDATIONS**

1. *It is recommended that the phrase "damages for injurious affection" be amended to read "injurious affection."*

2. *It is recommended that the opening words of the section should be "The value of any advantage, whether special or general, to the land or remaining land . . ."*

SECTION 25 — OFFERS

All persons with an interest in or charge against the compensation should know that the expropriating authority is prepared to make an offer of payment of compensation; it does not follow that each such person should receive a separate offer. The section, unfortunately, does not make it clear that joint offers are permitted in proper cases. There seems nothing wrong in principle with a joint offer being made to an owner and his wife who has an inchoate dower interest, or to an owner and his mortgagee. Where there are lienholders or execution creditors, it would be unreasonable to expect the expropriating authority to decide on the validity of the claim and make a separate offer to each. If joint offers are clearly allowable, then a single offer could be made jointly to the owner, the execution creditors and lienholders since in a complex situation, the main function of the document is to give notice that money is available.

**RECOMMENDATIONS**

1. *Section 25 should apply only where land has been expropriated. It should not be necessary, and indeed it is normally impossible, to make the offer in cases involving road closing damages or injurious affection where no land is taken.*

2. *Section 25(1)(a) should commence with the words "serve upon the registered owner or upon two or more registered owners jointly in the discretion of the expropriating authority, . . ."; and section 25(1)(b) should contain a similar amendment.*

3. *The offer excludes "compensation for business loss . . . under sub-section 1 of section 19". It is unreasonable for*

*the offer to include an estimate of compensation under section 19(2) and it is recommended that the exception should cover all of section 19.*

4. *Section 25(1)(b) provides that the tender of compensation is subject to adjustment in accordance with a later determination or settlement. It is recommended that the section should specifically provide that the excess constitutes a debt due to the expropriating authority which may be recovered in any court of competent jurisdiction.*

## SECTION 25(2) — APPRAISAL REPORT

There has been continuous uncertainty as to the meaning of section 25(2) which provides that the offer is to be based upon an appraisal report. If the purpose of the provision is merely to indicate that the offer of compensation is bona fide, then a relatively brief report would suffice. In a recent case, however, the Divisional Court held that the purpose is to provide a report containing sufficient detail to enable the owner (and presumably his advisers) to determine whether the offer should be accepted; this would require a more detailed report. Practice under the section has varied from authority to authority. It is apparent that a mere skeleton report is insufficient; on the other hand, full-scale reports such as independent fee appraisers prepare, are extremely expensive and it could not have been intended that these be supplied in every case. A report striking a balance between the two extremes should be satisfactory.

### RECOMMENDATION

*It is recommended that section 25(2) should define a report to mean "an appraisal report, in reasonable detail, containing a description of the property, the date of valuation, the zoning, the highest and best use, factual data necessary for the value estimate, an analysis of the data including the mathematical computations if any, and the final value estimate.*

*The date of valuation contained in the report should be within 6 months of the date of the registration of the notice of approval or plan under section 9.*

## SECTION 25(4) — FAILURE TO SERVE OFFERS AND REPORT

Section 25(4) provides for the consequences of failure to serve the offer required by section 25(1)(a). The section has been found confusing because there is no reference to the consequences of failure to serve the offer required under section 25(1)(b) or the appraisal report under section 25(2).

### RECOMMENDATION

*It is recommended that section 25(4) should be repealed and the following substituted:*

*"(4) If the expropriating authority does not*

*(a) serve the registered owner with the offer required to be served on him under paragraph (a) of subsection (1),*

*(b) offer the registered owner immediate payment as required under paragraph (b) of subsection (1); or*

*(c) serve a copy of the appraisal report under subsection (2), within the time limited in subsection (1) or subsection (2) as the case may be, or by an order of a judge under subsection (3) or by agreement,*

*the failure does not invalidate the expropriation but interest upon the unpaid proportion of any compensation payable to such registered owner shall be calculated from the date of registration of the plan."*

## SECTION 27 — BOARD OF NEGOTIATION

The work of the Board of Negotiation has been proceeding successfully for 10 years and it is not suggested that section 27 needs amendment. However, a submission has been received to the effect that a permanent vice-chairman should be designated under subsection (1) and that a single member of the Board should be sufficient to perform the functions of section 27 for claims up to $2,000.

## SECTION 29 — EXPERTS' REPORTS

There has been uncertainty whether, under this section, it is necessary to serve the reports of expert witnesses other than real estate appraisers. Some counsel have taken the position that it is not necessary to serve any report which will not be filed in evidence, on the argument that it is not "relied upon." The Board has adopted the practice, when a report has been delivered late, of offering the opposing party an adjournment.

Submissions have been made that a 15-day period is too short to provide adequate time to study a report and consider a new offer of compensation. If a longer period is specified, however, greater lead-time must be allowed between notice of the Board's appointment and the date of the hearing.

### RECOMMENDATIONS

1. *It is recommended that section 29(1) be amended to read:*

*"At least 21 days before the date fixed for the hearing of an application before the Board, any party to the application shall send to each other party or his solicitor, a copy of the report upon which will be based the evidence of any person who will be called by the party to give opinion evidence at the hearing."*

## SECTION 31 — STATED CASE

Cases occasionally arise where the parties can reach a settlement provided a critical point of law is first decided. In other cases there have been collateral issues of law which the Land Compensation Board is without jurisdiction to decide. The procedure by way of stated case to the Divisional

Court is useful for such cases. Section 31, unfortunately, provides for a stated case only when the Board has first given a decision, order or direction, or where its jurisdiction is in issue. This is surely too limited; the procedure should be available upon a statement of facts sent to the Court without a prior ruling by the Board. It is not felt that the Board should have the right to state a case on its own motion but rather upon request of the parties; the Board's views on the matter would of course carry significant weight as to the decision to make such a request.

**RECOMMENDATION**

*It is recommended that section 31 be amended to read "The Board may, upon the application of any party, state a case in writing for the opinion of the Divisional Court upon any question that, in the opinion of the Board, is a question of law."*

SECTION 32 — NOTICE OF APPEAL

Section 32(2), which provides a time period for taking an appeal to the Divisional Court, is highly unsatisfactory, and has only proved workable at all because the period itself is so generous. As the subsection now stands it is usually impossible to determine on what day the period commences, because it requires knowledge of the day on which the Board's determination or order was mailed from its office. The determination (decision) and order are mailed on different days and the subsection does not indicate which one governs. It is the Board's practice to use the same date for its decision and order, and it should be reasonable to calculate the appeal period from this date since the Board mails the decision promptly to the parties.

**RECOMMENDATION**

*It is recommended that section 32(2) be amended to provide that the appeal period of 6 weeks commence on the date of the Board's decision.*

SECTION 34 — INTEREST

Section 34(1) reads:

"34. — (1) Subject to subsection 4 of section 25, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands."

This section is in accordance with the following statement in the Report of the Ontario Law Reform Commission:

"The awarding of interest should be regarded as compensation for temporary loss of capital. It should therefore be payable on the portion of the compensation consisting of market value and not on the portion representing damages. Particularly in the case of business disturbance, allowing interest on damages would result in excessive compensation."

The Land Compensation Board, after marching to several different drummers, now appears to have adopted a uniform interpretation of the section, by awarding interest on land value from the cessation of use or residence, and on damages from the date of the award. This appears to be a satisfactory result.

The section contains a paradox. Interest is not awarded on damages from the earlier date but is so awarded on injurious affection; injurious affection, however, is defined to mean damages in certain circumstances.

**RECOMMENDATION**

*It is recommended that the provision for interest on injurious affection be clarified to refer only to that portion of injurious affection constituting a reduction in land value.*

For many decades the allowable rate of interest was 5% per annum; it was raised to 6% in the present Act. Numerous submissions have requested that the rate be increased to a rate more properly representing a fair return on capital. The Law Reform Commission had recommended a rate at ½ of 1% above the current National Housing Act rate for ordinary home owner loans, rather than a fixed rate. The 1974 Alberta statute provides for interest "at such rate as the Board considers just"; under the 1970 Manitoba act interest is fixed by order of the Lieutenant Governor in Council; the 1973 New Brunswick statute provides for interest at 6%; in the federal Act the basic interest rate is determined in accordance with an order made by the Governor in Council, being not less than the average yield from Government of Canada treasury bills (it seems to be 6% at present).

Out of this complexity it is first of all concluded that a fixed rate is much more desirable than a fluctuating rate. It should be selected with a view to fairness to the owner, but not made so attractive that the statutory offer will be refused in favour of leaving the money as a safe investment. It will have to represent an average for fluctuating conditions over a considerable period of calculation.

For ease of amendment the rate should be fixed by regulation; a rate of 8% might be regarded as appropriate at present, if it is not retroactive.

**RECOMMENDATION**

*It is recommended that sections 34, 39(1) and 45 be amended to provide that the allowable rate of interest for sections 34 and 39(1) be fixed by regulation.*

SECTION 37 — COMPENSATION NOT EXCEEDING $1,000

*It is recommended that the figure $1,000 should now be raised to $2,000.*

SECTION 39 — PAYMENT INTO COURT

*It is recommended that a provision of the Newfoundland statute be adopted and section 39 be amended to provide that*

*upon payment of compensation into Court the Accountant shall give a receipt, and that receipt shall constitute a full and valid discharge in respect of liability to pay compensation arising out of the expropriation of or injurious affection to the land, or the closing of the roads.*

SECTION 40 — POSSESSION

The statute provides that, after giving at least 3 months' notice, the expropriating authority "shall take possession" of the land; the section does not say "may take possession." Some authorities regard as a hardship the necessity of taking possession on the precise day they have specified. The wording is, however, deliberate; it follows from a recommendation in the McRuer Report that, having given notice, the expropriating authority should in fact be obliged to take possession with all the attendant consequences which flow from possession or occupancy, on the day specified, or on the adjusted date. It is not proposed that the statute be changed.

Six years' operation of the statute indicates that the provision for at least three months' notice is satisfactory in most cases; the section provides for an application to a judge by either party for an adjustment of the date of possession. A strongly-reasoned submission has been made that, in the case of easements for pipelines, ten days' notice of possession should be satisfactory. The Ontario Federation of Agriculture, on the other hand, opposes any reduction. Since the statute provides for an application to a judge who may abridge the time for possession after considering the individual facts of any case, it is not recommended that Section 40 be changed.

**RECOMMENDATION**

*It is recommended that the closing words of section 40(1) should be "shall be entitled to the exclusive right to possession and shall take possession of the land on the date specified in the notice."*

SECTION 41 — WARRANT FOR POSSESSION

One of the devices to apply pressure to expropriating authorities is to withhold possession upon the date specified in a proper notice, or adjusted by the judge. This can cause delay and expense in relation to construction contracts. There should be a provision for a penalty in cases of wrongful or vexatious denial of possession. Such penalties are provided in the English, Manitoba and Quebec statutes.

**RECOMMENDATIONS**

1. *It is recommended that the Land Compensation Board may, in its discretion, deny or reduce the amount of costs or interest to which an owner would otherwise be entitled where, in its opinion, the owner has wrongfully or vexatiously refused to give up possession to the expropriating authority in accordance with the provisions of the statute.*

2. *A form of warrant should be added to the statute similar to form 1 of The Public Transportation and Highway Improvement Act.*

SECTIONS 42 and 43 — ABANDONMENT

The concept of abandonment is of limited usefulness and may not be workable; however, it has such a gloss of rightness, that it cannot be buried. Under the present section:

(a) owners have the right of election to take back the land to be abandoned "at any time before the compensation . . . is paid in full", yet the section is silent about the return of the compensation already paid;

(b) where, as is likely, a mortgagee or other holder of a charge or lien, has been paid off, it is hard to see why such person should have a right to participate in the decision to take the land back;

(c) is it intended that the mortgagee should return the money paid to him and the mortgage be reinstated?

(d) where a lease has been frustrated by the expropriation, is it reinstated upon the abandonment?

To be consistent, all the extinguished interests should be restored, and a proper portion of the compensation paid for these interests should be returned. Where mortgages, liens and executions are involved, the situation is a mess.

**RECOMMENDATIONS**

*To make the best of an unworkable concept, the following suggestions are diffidently made:*

1. *The election shall be only an election to negotiate with the expropriating authority for the return of the land to the owner, subject to all proper adjustments of compensation paid and of compensation for consequential damages.*

2. *The Land Compensation Board may arbitrate the said adjustments and compensation.*

3. *The right to elect should not be given to any owner of a charge, lien or other encumbrance who has been paid in full.*

4. *If the parties do not reach agreement within 6 months, or within such further period as the parties agree upon, the expropriating authority shall retain the land.*

5. *A provision similar to section 18 of the federal statute should be enacted to the effect that the owners must make their elections in writing within 30 days, failing which the land should be retained.*

6. *Revesting should occur upon registration of the declaration of abandonment.*

7. *Section 42 should not apply to expropriations under section 336(3) of The Municipal Act or section 93 of The Public Transportation and Highway Improvement Act, or under similar provisions which authorize the acquisition of a greater quantity of land at a more reasonable rate.*

Concern has been expressed about the applicability of abandonment where a public project, such as a new town, contemplates that the land will ultimately be held in private hands. Most projects involve perpetual public ownership. It is not intended that developments of this kind should be frustrated by the abandonment provisions of section 42 or the disposal provisions of section 43.

This has not produced a problem with urban renewal projects in the last 10 years, presumably on the argument that the word "purposes" in the clause "where . . . the land . . . if found to be unnecessary for the purposes of the expropriating authority . . .", includes transfer of the lands into private ownership.

**RECOMMENDATION**

8. *To avoid difficulty it is recommended that sections 42 and 43 are not to apply where the purposes of the expropriating authority include the transfer of the land to private owners as part of the project for which the land was acquired.*

Section 43 contains ambiguity in respect of the words "without the approval of the approving authority"; it is uncertain whether the approval is necessary for the disposal of the lands or for dispensing with the necessity of giving the owners first right to re-purchase

**RECOMMENDATIONS**

9. *It should be made clear that the approval of the approving authority relates to the disposal of the land to someone other than the owner from whom the land was taken.*

10. *It is recommended that a time limit be introduced into section 43; the Alberta statute has a time limit of 2 years and this should be satisfactory. Without such a limitation, an owner would have to be given the first chance to re-purchase, even though the expropriation occurred 50 years previously.*

## SECTION 44 — CHALLENGE TO EXPROPRIATION

This section does not provide a limitation period for certain challenges to the expropriation. The English statute provides that a challenge to a compulsory purchase order must be made within 6 weeks; otherwise it may not be questioned by any legal proceedings whatsoever. Any person who wishes to attack the validity of an expropriation or any step in the procedure should do so promptly after the matter comes to his attention, because of the statutory requirement that the expropriating authority must make an

offer and because construction of the public work often commences fairly quickly. It seems fair and in accordance with authority that the validity of the expropriation should not be challenged by an owner who has accepted any part of the compensation, on the principle that he should not be allowed to approbate and disapprobate.

**RECOMMENDATION**

*It is recommended that the essential elements of section 44 should be*

*(a) an owner may not challenge the validity of the expropriation by any legal proceedings whatever after he has accepted any part of the compensation; and in any event not after one year from the registration of the notice or plan under section 9; or where he received no statutory notice of expropriation, or late notice, beyond one year after the expropriation became known to him.*

*(b) any application or action to set aside, quash or otherwise challenge any particular proceeding or step shall be taken within 30 days of the proceeding or step or within 30 days of the proceeding or step coming to the attention of the applicant.*

## ADJUSTMENT OF TAXES

It has been the common practice for real property taxes to be adjusted as of the date of possession by the expropriating authority. It has been regarded as fair for the owner to continue paying the taxes as long as he has had enjoyment of the property. This is particularly so in view of the provision that 3 months' notice of possession must be given and the requirement for a tender of compensation being made during that period. A recent decision *Re Sankey* v. *The Township of King,* [1973] 3 O.R. 580 throws doubt on the practice, and the matter should be clarified.

**RECOMMENDATION**

*A section should be included in the statute to provide that real property taxes are the responsibility of the owner until he ceases to reside in or make productive use of the property. Section 22(2) of the Manitoba statute is:*

*"22(2) Notwithstanding that land vests in an authority under this Act, the land is subject to the assessment and levy of all municipal rates, levies, and taxes to the same extent as if it had continued to be owned by the owner from whom the land is expropriated; and that owner is liable to pay all taxes, rates and levies levied or assessed against the land in respect of the period he remains in possession of the land whether under an express agreement or otherwise"*

## APPENDIX A

## EXTRACT FROM TARIFF OF PROFESSIONAL CHARGES OF THE ROYAL INSTITUTION OF CHARTERED SURVEYORS

### WORK UNDER THE LANDS CLAUSES CONSOLIDATION ACT OR OTHER ACTS FOR THE COMPULSORY ACQUISITION OF PROPERTY

(a) To the valuer who prepares the case (including negotiation for a settlement, where required):

The Scale set out below.

(b) To any additional valuer who qualifies to give evidence:

Three-quarters of the Scale set out below.

| Amount | Fee | Amount | Fee |
|---|---|---|---|
| £ | £ | £ | £ |
| 100 | 10.50 | 5,400 | 84.00 |
| 200 | 14.70 | 5,600 | 86.10 |
| 300 | 18.90 | 5,800 | 88.20 |
| 400 | 23.10 | 6,000 | 90.30 |
| 500 | 27.30 | 6,200 | 92.40 |
| 600 | 29.40 | 6,400 | 94.50 |
| 700 | 31.50 | 6,600 | 96.60 |
| 800 | 33.60 | 6,800 | 98.70 |
| 900 | 35.70 | 7,000 | 100.80 |
| 1,000 | 37.80 | 7,200 | 102.90 |
| 1,200 | 39.90 | 7,400 | 105.00 |
| 1,400 | 42.00 | 7,600 | 107.10 |
| 1,600 | 44.10 | 7,800 | 109.20 |
| 1,800 | 46.20 | 8,000 | 111.30 |
| 2,000 | 48.30 | 8,200 | 113.40 |
| 2,200 | 50.40 | 8,400 | 115.50 |
| 2,400 | 52.50 | 8,600 | 117.60 |
| 2,600 | 54.60 | 8,800 | 119.70 |
| 2,800 | 56.70 | 9,000 | 121.80 |
| 3,000 | 58.80 | 9,200 | 123.90 |
| 3,200 | 60.90 | 9,400 | 126.00 |
| 3,400 | 63.00 | 9,600 | 128.10 |
| 3,600 | 65.10 | 9,800 | 130.20 |
| 3,800 | 67.20 | 10,000 | 132.30 |
| 4,000 | 69.30 | 11,000 | 142.80 |
| 4,200 | 71.40 | 12,000 | 153.30 |
| 4,400 | 73.50 | 14,000 | 174.30 |
| 4,600 | 75.60 | 16,000 | 195.30 |
| 4,800 | 77.70 | 18,000 | 216.30 |
| 5,000 | 79.80 | 20,000 | 237.30 |
| 5,200 | 81.90 | 1.05 per cent on the remainder | |

Where works are negotiated by the surveyor, the cost of such works, and any amount set off in respect of betterment, should be added to the amount of the settlement for the purpose of calculating the fee chargeable under the Scale set out above.

NOTES:—

(i) This scale does not apply to arbitrators or umpires.

(ii) This scale is exclusive of attendance in court or before the Lands Tribunal or umpires or at arbitrations, in respect of which the fee should be by arrangement according to the circumstances, including the professional status and qualifications of the surveyor.

(iii) Where the compensation is between the figures given in the left-hand column of the table, if the settlement is under £1,000 the fee on the next higher amount applies. If the settlement is over £1,000 the fee is that shown in the table against the next lower amount plus 1.05 per cent on the remainder, fractions of £100 being taken as £100.

(iv) For settlements under £100 — 10.5 per cent, with a minimum fee of £7.50.

APPENDIX B

## CUMULATIVE SUMMARY OF AWARDS OF THE BOARD

FROM APRIL 1, 1971 to SEPTEMBER 30, 1974

| | | Claimed | Awarded |
|---|---|---|---|
| (a) | Market Value | $27,089,630 | $11,195,803 |
| (b) | For Damages | | |
| | (1) Disturbance | 1,151,691 | 426,969 |
| | (2) Injurious Affection | 1,786,783 | 395,025 |
| | TOTAL | $30,028,608 | $12,016,718 |

NOTE: One of the Notices of Arbitration was for a claim for compensation totalling $10,000,000. The award of the Board was $58,000.